SUPREME COURT, U.S.
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NO. 71-1466

IN THE

Supreme Court of the United States

October Term, 1971

RICHARD WILLIAM GORSALITZ, *Petitioner*

v.

OLIN MATHIESON CHEMICAL CORPORATION, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Richard William Gorsalitz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 4, 1972, and the Petition for Rehearing and for Rehearing En Banc, overruled and denied March 9, 1972.

OPINIONS BELOW

The first opinion of the District Court for the Southern District of Texas, Houston Division, entered March 20, 1969, is not reported, and appears as Appendix A. The second opinion of the District Court entered March 26, 1971, is not reported, and it appears as Appendix B.

The first opinion of the United States Court of Appeals for the Fifth Circuit entered June 17, 1970 is reported at 429 F.2d 1033, and appears as Appendix C. The second opinion of the Court of Appeals was entered February 4, 1972, and is reported at ____ F.2d ____, and appears as Appendix D. The Order overruling Motion for Rehearing and for Rehearing En Banc was entered March 9, 1972, and appears as Appendix E.

JURISDICTION

The judgment and opinions of the United States Court of Appeals for the Fifth Circuit was entered February 4, 1972 (Appendix D). The Petition for Rehearing and Rehearing En Banc was denied by order entered March 9, 1972 (Appendix E).

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

A. What are the constitutional "limits" of the "remittitur practice", if it can be reconciled with the Seventh Amendment?

B. What "guidelines" are essential in the federal system to insure that the trial courts do not interfere

with jury's findings of damages where the "quantum" of damages in personal injury litigation does not comport with the trial court's "idea" of what is reasonable compensation?

C. Where the trial court and appellate court cannot conclude the damages assessed by the jury are clearly wrong, or that an injustice will result if permitted to stand, and where the record supports the award of the jury under a general verdict as to damages, can the courts require a remittitur without violating the Fifth Amendment (due process) and the Seventh Amendment (right to jury trial) of the Constitution of the United States?

D. Where plaintiff's injuries consist of extensive disfigurement and injuries which the average person might consider "horrible beyond belief" which would invoke some natural sympathy even from an unbiased jury, is such plaintiff's right to a jury finding of damages to be preserved under the Seventh Amendment of the Constitution of the United States, or does such "unusual" high damage cases require a trial court's firsthand review if the court disagrees with the jury's award?

More precisely, and directly at issue concerning the particular remittitur in this case, the following questions are presented:

I. *LOSS OF FUTURE EARNING CAPACITY*

(1) Since a federal Texas jury in this diversity suit had the options of determining (a) that plaintiff's future earning expectancy may exceed his life expectancy as

established by actuary tables; (b) that future wages might exceed his current wages by reason of future promotions, advancements in skills, or due merely to inflationary trends of skilled laborer's salaries; and, (c) whether to discount the future wage loss for a "present value" since a safe investment may be "offset by inflation", can the District Court enforce a reduction of the jury's award of $452,400 for loss of future earning capacity under the "Maximum Recovery Rule" for remittiturs based on the following formula, without violating the Fifth and Seventh Amendments of the Constitution of the United States?:

Annuity Formula

Loss of future earning capacity
-equals-
Current wages at time of trial
-multiplied by-
Life Expectancy
-reduced to-
Cost of an Annuity at 4%

(2) Does the affirmance by the Court of Appeals constitute a direct conflict with *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed. 310 (Sup.Ct. 1968); *St. Louis Rwy. Co. v. Williams*, 397 F.2d 147 (5th Cir. 1968); *Rosiello v. Sellman*, 354 F.2d 219 (5th Cir. 1965); *Farmers Union Federated Coop. Ship. Assn. v. McChesney*, 251 F.2d 441 (8th Cir. 1958); *Dagnello v. Long Island Railroad Co.*, 389 F.2d 797 (2nd Cir. 1961); and, *Brinegar v. San Ore Construction Co.*, 302 F.Sup. 630, which hold:

"The cost of an annuity for the remainder of the injured person's life is not the measure of recovery for lost or diminished earning power."

(3) Is the affirmance by the Court of Appeals of a remittitur of $206,004 of plaintiff's *minimum* award of $452,400 for loss of future earning capacity, by the "annuity formula", an abuse of discretion or error of law, requiring the Supreme Court to grant certiorari to protect plaintiff's right to a jury trial of fact issues and to protect plaintiff's right to equal protection of the law?

(1) Is the affirmance by the Court of Appeals of a remittitur of the jury's award to $400,000 for past and future pain, mental anguish, disfigurement, incapacity, and loss of life's enjoyments, based upon the District Court's "formula" that the award should not exceed an amount "which approximates *twice* the maximum sum of past and future medical expenses", a violation of the Seventh Amendment of the Constitution of the United States which provides that "no fact issue shall be re-examined other than according to common law".

II. *PAST AND FUTURE PAIN, MENTAL ANGUISH, DISFIGUREMENT AND LOSS OF LIFE'S ENJOYMENTS*

(2) Should the Supreme Court grant certiorari to review the holding of the Court of Appeals and district court since neither court could hold that the jury's award was "clearly erroneous" or was not supported by the evidence?

(3) Since a federal district judge in Pennsylvania, sitting as a jury in a federal tort claims case, allowed a similarly injured plaintiff $15,067.59 per year for past

and future pain and suffering in *Schwartz v. United States*, 230 F.Supp. 536 (E.D. Pa. 1964), is the affirmance of *Gorsalitz's* per year recovery for past and future pain and suffering by remitting his damages to $10,335.92 per year a violation of the Seventh Amendment of the Constitution of the United States, an abuse of judicial discretion, or an error of law, requiring the Supreme Court to grant certiorari to protect plaintiff's right to a jury trial?

(4) Since the Constitution of the United States entrusts the determination of unliquidated damages for disfigurement and pain and suffering to a jury, does the remittitur practice, if it is reconciled with the Seventh Amendment, permit a court to substitute his idea of what is reasonable compensation for that of the jury's without the court first determining that no reasonable person could make such an award under the record presented?

(5) In the alternative, is the forced remittitur of $492,971 of plaintiff's jury verdict a violation of the Seventh Amendment of the Constitution of the United States, an abuse of judicial discretion, or error of law, where the record establishes:

(a) The evidence *clearly* supports the verdict; reasonable minds could differ as to the quantum of damages; and, the court cannot say the damages awarded were "monstrous", "clearly wrong" or that it would be an injustice to permit the verdict to stand;

(b) There is no proof or claim of jury misconduct, prejudice, or passion;

(c) The Court admits that no sane person would accept $1.38 Million for the damages suffered by plaintiff; and,

(d) The trial court has *substituted* his "idea" of the proper damages for that of the jury's merely because the court thought the "jury was over-zealous in attempting to compensate the plaintiff for something to them would be incompensable", thereby inferring that where horrible disfigurement is involved that juries are not capable of ascertaining damages, and that the final measurement must be made by an enlightened judge who is more qualified to equate the damages,

requiring the Supreme Court to grant certiorari to "review the record" in order to protect plaintiff's rights to a jury trial, and to set the "guidelines" of the remittitur practice, if it is to be permitted?

III. *IS PLAINTIFF ENTITLED TO INTEREST ON PAST DAMAGES?*

Are plaintiff's rights under the Fifth and Seventh Amendments of the Constitution of the United States violated by an affirmance of a remittitur which permits recovery of only the actual damages for loss of past earnings and medical expenses, without allowance of any sum as "interest" or for detention of money, where the jury is instructed to award damages for such "past losses" as will "fairly and reasonable compensate the plaintiff for such past expenses and losses, if paid now in cash"?

IV. *FUTURE MEDICAL*

Where the record establishes that plaintiff will suffer in the future probable brain damage, osteomyelitis, and other problems unrelated to proposed 33 future contemplated corrective facial surgeries, and that in such

event that "the sky is the limit" as to future medical expenses, is the affirmance of a remittitur of the jury's award for future medical expenses to the "amounts necessary solely to the 33 corrective facial surgeries", a violation of the Seventh Amendment of the Constitution of the United States, and the substantive law of Texas and of the Fifth Circuit which holds that the jury is not bound by expert opinions of future medical expenses based upon present day costs, but can determine such damages from their "common sense and knowledge" in light of all the evidence and consideration of the inflationary trends of medical costs?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

1. Seventh Amendment of the Constitution of the United States.
2. Fifth Amendment of the Constitution of the United States.
3. Rule 50(b), Federal Rules of Civil Procedure.
4. Rule 50(a), Federal Rules of Civil Procedure.
5. 28 U.S.C. Section 2106.

STATEMENT

In this personal injury suit under the diversity jurisdiction of the court, the plaintiff, Richard William Gorsalitz, recovered a jury verdict on October 10, 1968, for damages in the amount of $1,380,000 due to the negligence of the defendant, Olin Mathieson Chemical Corporation. On defendant's motion for new trial, the

District Court sustained defendant's claim of excessiveness of damages, and required plaintiff to remit approximately one-half of the verdict, remitting the damages to $690,633. Plaintiff took the remittitur under protest. Both parties then appealed from the final judgment.

On the first appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment as to defendant's appeal, both as to liability and as to its claim for indemnity against General Electric Corporation, and said cross-defendant was not a party on the remand. On remand, the interest of the intervenor, Electric Mutual Liability Corporation, as to its subrogation interest under Texas Workmen's Compensation Law, was paid under a separate judgment, and intervenor is not a party to this appeal.

On the first appeal, the Court of Appeals held that the remittitur required a remand under plaintiff's appeal, holding:

> *"In the present case the district court simply substituted its view of a reasonable amount to award the plaintiff for the verdict of the jury."*

The appellate court concluded that it could not hold that it was an "abuse of discretion" for the district court to remit *"some amount"* from such a large veridict, and remanded the case under "The Maximum Recovery Rule" for the district court to *initially* determine what the maximum amount of damages would be under the record if assessed by a properly functioning jury, holding that the "remittitur practice", *when used in a proper case*, did not violate the Seventh Amendment of the Constitution of the United States.

In remanding the case, in an effort to reconcile the "remittitur practice" with the Seventh Amendment, the Court of Appeals set a "guideline" for the trial court's review of the damage finding by adopting the *rationale* of *Glazer v. Glazer,* 278 F.Supp. 476 (1968), as follows:

> ". . . the expressions of the United States Supreme Court furnish inferential support for the 'maximum recovery' view. In Northern Pacific R.R. v. Herbert, 1886, 116 U.S. 642, 646-647, 6 S.Ct. 590, 592, 29 L.Ed. 755, the court approved as a 'matter within the discretion of the trial court,' a remittitur 'of so much of the damages as, in its opinion, the jury had improperly awarded. * * *
>
> Where damages are either liquidated or can be determined by the application of fixed rules to any given set of facts, a verdict for more than the amount of damages that would be allowable under a correct computation is wrong as a matter of law and should be set aside. However, in many instances the damages are to be measured in whole or in part by the jury's discretion. This is the situation where recovery is sought for a personal tort, where punitive damages are allowed, or where as here the amount of damages depends in part on what is a reasonable term for a contract. In such cases, the fixing of damages is an integral part of the jury's function.
>
> By definition in these situations, the legal rules governing the amount that should be awarded as damages allow a wide discretion to the jury. A trial court's power to direct a new trial is a part of its duty to superintend the proper functioning of the jury and in its exercise of this power a court must necessarily allow the jury to exercise the range of discretion entrusted to it by the law. Any rule that attempts to define the court's function should remind the court 'of the breadth of the jury's sphere'. * * *

> . . . Therefore, the same respect for the 'breadth of the jury's sphere' should be required in figuring the amount of remittitur as in determining whether a new trial should be granted on the basis of an excessive verdict.
>
> Moreover, it seems to this Court that reduction of the verdict only to the highest amount that the jury could properly have awarded is the 'only theory which has any reasonable claim of being consistent with the Seventh Amendment' * * *.
>
> In proceeding to fix the remittitur, then, the Court will be guided by the principle that the plaintiff who has been awarded an excessive amount by one jury should have the option of taking the maximum amount that the jury could properly have awarded or of taking a new trial before another one. In determining this, it appears proper first to fix the amount that this Court thinks a properly functioning jury would have awarded, and this may be merely another way of saying that the starting point is the amount of damages the Court itself thinks proper on the record under the mandate of the Court of Appeals. After that, the maximum recovery rule requires the Court to determine the maximum deviation from that verdict that could be allowed without requiring a new trial."

Upon remand, the District Court refused to follow the mandate of the Court of Appeals, and instead of determining what was the "maximum deviation" from the Court's "idea of damages", once more substituted the court's evaluation of damages for that of the jury's, and required a remittitur based on the following computations:

(1) Loss of past earnings ($11,800 salary at time of injury for 3 years and 11 months, without allowances for increase in salary or interest on past damage):	$ 46,213
(2) Loss of future earnings ($13,000 salary as of time of trial for life expectancy of 34.8 years, without allowance for inflation and excluding any future increases in salary, *reduced to an annuity* based on semi-monthly installments at four percent interest) $452,400 reduced to an annuity:	$246,396
(3) Medical expenses to date of trial (actual expenditure with no allowance of interest to bring to present value):	$ 56,000
(4) Future Medical Expenses (actual expenses estimated by experts on present day values for 33 corrective facial surgeries, with no allowance for inflationary trends in medical costs or costs of probable complications such as brain damage or osteomyelitis where the experts state that "the sky is the limit"):	$138,420
(5) Pain, suffering, disfigurement, mental anguish, loss of life's enjoyments—Past and Future (calculated at two times the maximum past and future medical expenses, as being a fair manner of estimating pain and suffering):	$400,000
TOTAL:	$887,029

The District Court, therefore concluded that the remainder of $492,971 must "necessarily" have been a part of the jury's award for pain and suffering, past and future, and required a remittitur. However, it will be noted that $206,004 of this remittitur actually represents a reduction in the "minimum" future loss of earning capacity which the court incorrectly reduced to the "cost of an annuity"; therefore, if the remitted amount of $492,971 is reduced by this $206,004, then the Court is substituting $400,000 for pain and suffering against the jury's award of $696,967. Even this computation is inaccurate since no allowance is made to bring past expenses and damages to "a present value", the jury could have assessed more for future medical expenses, and could have assessed more than $452,400 for future loss of earning capacity even if reduced to a present value.

Plaintiff again took the remittitur "under protest" and again appealed to the Court of Appeals for the Fifth Circuit. Defendant did not appeal.

On the second appeal, the Court of Appeals' opinion consisted of five pages, affirming the court's computation of damages except for the allowance for past wage loss, holding that the remittitur was not an abuse of discretion, error of law, or in violation of the Seventh Amendment. The Court of Appeals modified the damages for past wage loss by use of the "average annual increase" formula to bring to a "present value", but without allowance of any interest or sum for the detention of money. The Court added the $2,737, and modified the judgment to increase plaintiff's recovery to $889,766 and affirmed the judgment as modified.

On Motion for Rehearing and for Rehearing en banc the Court of Appeals refused to reconsider its opinion.

The opinions of the District Court and Court of Appeals summarize the details of plaintiff's injuries, and the details of injury will not be repeated as part of this statement.

Appendix F and G show $57,742.27 in medical cost and hospital bills under various exhibits admitted in evidence (certainly exceeding the $56,000 allowed by the Court). The Appendix also clearly shows that it would require an additional $9,162.69 to bring the past expenses to a "present value at time of trial".

Appendix H is plaintiff's computation of future medical under the maximum recovery rule, showing that reasonable persons could conclude that the future medical might be as high as $590,350, instead of the sum of $138,420 allowed by the Court.

Appendix I is a computation by Petitioner representing his view of a reasonable construction of the damage award consistent with the record and the Court's first hand review.

Finally, a picture is worth a thousand words, and Petitioner submits photographic evidence admitted on trial as to the extent of his facial injuries and disfigurement to assist in evaluation of this petition. (Appendix K).

REASONS FOR GRANTING THE WRIT

The Supreme Court should carefully scrutinize the remittitur as it "opposes" the jury's evaluations of damages under a general verdict where a trial judge "substitutes" his evaluations of damages where he has no "fact-finding" jurisdiction.

The *injustice* of the forced remittitur in this case lies in the fact that neither the district court, nor the appellate court, could conclude that the verdict was "clearly wrong, or unjust", nor is there any proof of jury misconduct or prejudice or passion shown, other than by inference of a "larger verdict" that previously awarded. In truth, the verdict is rather mild when compared with verdicts rendered since that date:

$3 Million—*Murdock v. City of Philadelphia,* ____F. Supp.____ (E.D. Pa. 1-20-71).

$3.6 Million—*Bush v. General Electric Co.,* Dist. Ct. Washoe County, Nevada, Oct. 16, 1970. Amer. Trial Lawyers Letter, Vol. 13, No. 10, Dec. 1970.

$2.25 Million—*Stahl v. Coca Cola Company of Georgia,* Cir. Ct. Dade County, Fla., 3-20-70. Amer. Trial Lawyer's Letter, April 1970, Vol. 13, No. 3.

$1.5 Million—*Talcott v. Hall,* 224 So.2d 420 (Fla.) *affirmed on appeal.*

The "true violation" of the remittitur, within the Seventh Amendment framework, is that the quantum of damages assessed by the jury is within the limits of a reasonable range by reasonable persons viewing the over-all impact upon plaintiff of such serious and permanent injuries.

The holdings in this case permit the "ideal vehicle" for the Supreme Court to establish once and for all whether the Fifth Amendment and Seventh Amendments of the Constitution authorize the "remittitur practice". If it is compatible with the constitution, then the Supreme Court should itself establish the "guidelines" for factual review of jury findings relating to damages, rather than to leave such important questions to the lower courts.

If general jury verdicts for damages are to continue in the federal system, then plaintiff's verdicts will never be safe from the watchful eye of a judge who is more conservative than the jury. The *injustice* of the remittitur practice lies in the fact that a plaintiff could never refuse the remittitur as in most instances he has presented all evidence of future claims of damages, and in a new trial situation he would again be faced with the same evidence, and the same judge with the same views, who could again grant a new trial and from which no appeal would lie.

Aside from the constitutional questions presented, the decision affirming the trial court's remittitur under the record in this case involves an important question of substantive law which is in "direct conflict" with prior decisions of the Supreme Court, the Fifth Circuit's own opinions, opinions of other circuits, and the law of Texas. In holding that a district court can "remit" plaintiff's loss of future earning capacity to the "cost of an annuity", the Fifth Circuit's opinion conflicts with the following cases:

(1) *Grunenthal v. Long Island R. Co.*, 89 S.Ct. 331, 393 U.S. 156, 21 L.Ed.2d 309 (1968).

(2) *St. Louis S.W. Rwy. Co. v. Williams*, 397 F.2d 147 (5th Cir. 1968).

(3) *Rosiello v. Sellman*, 354 F.2d 219 (5th Cir. 1965).

(4) *Brinegar v. San Ore Construction Co.* (Ark. 1971), 302 F.Supp. 630.

(5) *Dagnello v. Long Island Railroad Co.*, 289 F.2d 797 (2nd Cir. 1961).

(6) *Schwartz v. United States*, 230 F.Supp. 536 (E.D. Pa. 1964).

(7) *Texas & N. O. R.R. v. Jacks*, Tex. Civ. App., 306 S.W.2d 790; *McIver v. Gloria*, Tex. Sup. Ct. 1963,

169 S.W.2d 710; and, *English v. Hedi,* Tex. Civ. App. 1960, 337 S.W.2d 860.

(8) *Farmers Union Federated Coop. Ship. Ass'n v. McChesney,* 251 F.2d 441 (8th Cir. 1958),

specifically holding that "The cost of an annuity for the remainder of the injured person's life *is not* the measure of recovery for lost or diminished earning power."

Brinegar v. San Ore Construction Co., 302 F.Supp. 630, 643, concisely states this substantive law applicable to this case:

> "The jury could have found, however, that the normal increase in earning capacity, as a young man acquires more experience, along with inflation, could have offset any reduction to present value. The jury could have reasonably found that Brinegar would have earned much more than $434,470 over his life expectancy, since the latter figure assumes that his salary and earning would never increase and that dollar values would remain at their present level. The jury is not required to make such an assumption. Grunenthal v. Long Island R.R. Co., 393 U.S. 156, 80 S.Ct. 331, 21 L.Ed.2d 309 (1968)."

To correctly view the constitutional question involved, as well as the error of law and clear abuse of discretion, in this case, the Supreme Court has only to review the foregoing authorities in face of *the District Court's holding in this case,* where the Court finds:

> "LOSS OF EARNINGS FROM TIME OF TRIAL FOR LIFE EXPECTANCY
>
> "As to future loss of earnings, the evidence upon trial would not support a jury finding in excess of $13,000

per annum for the remainder of plaintiff's life. Plaintiff's life expectancy was shown to be 34.8 years. Considering the plaintiff's injuries and medical prognosis, the jury could not reasonably find a life expectancy in excess of this figure. Thus, the total amount of future earnings would be $452,400. However, the jury was instructed to award only such sum of money *if now paid in cash* as would reasonably compensate the plaintiff for his loss. Taking into consideration the decreased buying power of the dollar at present day and other intangibles that a properly functioning jury may consider in assessing an award for loss of future earnings, I find that the maximum amount the jury could reasonably determine to be compensatory of plaintiff's loss of future earnings, if now paid in cash, is $246,396."

The finding clearly permits no allowance of future wage increases or take into account the fact that inflationary trends might likely "offset" any reduction to a present value the future losses.

The Fifth Circuit determined on the second appeal to apply the "average annual increase" method to the past wage loss so as to bring to a present value, thereby ordering another $2,737 be added to past wage losses.

If this same method of "average annual increase" under the maximum recovery rule is applied to the loss of future earning capacity, Petitioner's salary of $13,300 during the first year of expectancy would increase to $23,500 in the thirty-fifth year. By merely adding $300 to each year of the life expectancy, Gorsalitz's loss of future earnings is $627,700.00 (without reduction to present value). However, even this is the "minimum" recovery as no consideration is given to inflation or the decreased purchasing power of the dollar in the future.

The affirmance of the district court's "formula" for reducing a general damage verdict presents a startling, and quite "novel" approach, which will present questions of substantial and recurring interest in the orderly administration of justice in the Federal judicial system. These *undesirable rules of excessiveness* are:

RULES FOR ESTABLISHING EXCESSIVENESS UNDER GORSALITZ

(1) A plaintiff may not recover any amount for loss of future earning capacity which exceeds the cost of an annuity, computed on plaintiff's earning capacity at time of trial, multiplied by his life expectancy, and reduced to the cost of an annuity at 4% interest under semi-monthly installments.

(2) Any recovery for pain and suffering, mental anguish, disfigurement, incapacity, and loss of life's enjoyments is excessive which exceeds twice the past and future maximum medical expenses.

(3) Any sum awarded for future medical expenses is excessive if it exceeds the estimate of expert medical opinions, based on present costs.

(4) Any verdict for past medical expenses is excessive if any allowance is made over the actual expenses, although the jury is required to find the "past expenses, if paid now in cash".

(5) A verdict is excessive which allows more than the actual loss of past earnings, and no allowance can be made of any sum to bring the past losses to a present value.

(6) If the trial court thinks the award is too high, the court may require a remittitur even though the record

supports the jury's assessment of damages when viewed in a light most favorable to the verdict, and even though the court cannot conclude that the award is "clearly wrong" or that "an injustice will result if the verdict is permitted to stand".

In face of these obviously incorrect standards of excessiveness, this Honorable Court stated in *Louisville & N. R. Co. v. Holloway,* 246 S.Ct. 525, 62 L.Ed. 867 (Sup. Ct. 1917) that a defendant is not entitled to an instruction by a "rigid" mathematical limitation that money would be worth 6% or that future benefits should be limited to the deceased's life expectancy according to actuarial tables, holding that it is for the jury to determine what is the amount which will "fairly and reasonably compensate for pecuniary benefits", both past and future.

In speaking of disfigurement, the Supreme Court said in *Erie Railroad Co. v. Collins,* 253 U.S. 76, 64 L.Ed. 790, that whether the verdict is "outrageously excessive", still that *"If all that be granted,* it was for the consideration of the jury. It certainly cannot be pronounced a proposition of law that personal mutilation or disfigurement may be a matter of indifference to anybody, or that sensitiveness to it may vary with 'temperaments' and be incapable of measurement".

The present remittitur is also in direct conflict with the holdings of the Fifth Circuit in *Steinburg v. Indemnity Insurance Co. of North America,* 374 F.2d 266 (5th Cir. 1966), *Korbut v. Keystone Shipping Co.,* 380 F.2d 352 (5th Cir. 1967), and *United States v. 1169.96 Acres of Land,* 432 F.2d 910 (5th Cir. 1971) where the court

held that if there is no showing that the verdict was influenced by passion, prejudice, or jury misconduct, that defendant's motion for remittitur must be denied.

Some of the trial court's observations on remand of this case exemplify this argument:

> "The Court: Then they refer to the Glazer v. Glazer as the way to do it (remittitur), and I have difficulty in applying Glazer v. Glazer to this case. (Appx. 1574)
>
> * * *
>
> Could you tell me how I could apply the Glazer case on remittitur, a breach of promise case, to this case, a personal injury case. (Appx. 1576)
>
> * * *
>
> "Mr. Holloway: I still believe, your Honor, the proper procedure would be to reinstate the verdict.
>
> "The Court: Well, that is one of the alternatives that I have before me, and there are strong reasons to do it and there were from the beginning except that I think it was an excessive verdict. I still think it is an excessive verdict. But I just don't know of my power to deal with it. That is what I'm confronted with now.
>
> "Mr. Holloway: Judge, you know at the initial time that this matter came up we were all of the impression this was a rather substantial verdict.
>
> "The Court: At that time it was the biggest one I ever heard of. (Appx. 1578-1579)
>
> * * *
>
> "Mr. Holloway: But the point is this, your Honor, the Court's initial memorandum opinion makes

an absolute and unequivocal finding that there is no jury misconduct presented. The jury was a hard working jury. If the Court will recall, they came back on at least one issue.

"The Court: That is one reason that I would not want a new trial. I think the case was well tried on both sides. I have tried a lot of cases and if one can in any way evaluate his own work, I think I tried this case as well as I have ever tried any case and I don't know that I could give a better trial if we did it again.

* * *

I did not flip a coin on any of these figures that I arrived at. *I don't think the jury did either.* However, the figure they found was the sum or amount sued for.

"Mr. Holloway: Well, your Honor, is that a sin for the jury to have found that?

"The Court: No, it isn't.

"Mr. Holloway: It is an amount that I thought was fair.

"The Court: I am not questioning your motives or the jury, Mr. Holloway." (Appx. 1591-1593)

When a trial court grants a new trial merely because he believes the verdict represents too much compensation, the trial court simply "substitutes" his opinion of damages for that of the jury's and he takes over, if not usurps, the prime reason for submitting factual issues to a jury. *When this occurs,* it becomes the Appellate Court's duty to exercise *a close degree of scrutiny and supervision so as to protect plaintiff's right to a trial by jury. Lind v. Schenley Industries, Inc.,* 278 F.2d 79 (3rd Cir. 1960), cert. den. 81 S.Ct. 58.

One reason why certiorari should be granted by the Supreme Court invokes the "due process" provisions of the Fifth Amendment of the Constitution. The closest factual appellate situation to the *Gorsalitz case is Schwartz v. United States,* 230 F.Supp. 536 (E.D. Pa. 1964), a Federal Tort Claim case where the trial judge sits as a jury to determine damages. Schwartz was a 36-year old attorney when his left eye was removed due to cancer with some excision of the cheek bone and maxillary sinus, and a part of the jaw bone, with accompanying skin graft from the abdomen, with resultant disfigurement. The injuries are similar to those suffered by Gorsalitz, but without the extensive numbers of surgery and initial intensive suffering Gorsalitz suffered from the electrical burns. Schwartz was able to practice law and earn a living afterwards, while Gorsalitz is totally disabled. Schwartz had only netted in 7 years of practice an average of $1,000 to $3,000 a year, and reaching $12,000 in one of the years, whereas Gorsalitz was earning $11,864.34 a year. Schwartz's future medical was at a minimum, whereas Gorsalitz's future medical will be a *minimum* of $138,420. The total award in *Schwartz* by a federal district judge is $809,928, whereas the jury allowed *Gorsalitz* $1,380,000; however, the award was five years earlier, and Gorsalitz involves more extensive injuries and expenses.

In the *Schwartz* case the district judge allowed $15,067.59 *per year* for pain and suffering, or a total of $546,950 for *pain and suffering* based on a 36.3 life expectancy.

The difference in life expectancy between Schwartz (36.3) and Gorsalitz (34.8) is only 1.5 years. *Therefore, if the Honorable Judge J. Freeman had assessed*

Gorsalitz's damages, the award for Gorsalitz's pain and suffering would have been $535,787.29. This figure is $135,787.29 more than permitted by the district court in this case even when allegedly viewing the verdict in a light most favorably to sustaining the verdict.

In *Frankel v. U.S.A.*, 321 F.Supp. 1331 (E.D. Pa. 1970) a federal district judge assessed $650,000 for pain and suffering.

Gorsalitz *insists* his damages be *at least equal* to the *Schwartz* award or *Frankel* award. Surely it cannot be reasonably contended that a federal district court judge in Pennsylvania would be "over-zealous in compensating for something to him which is incompensable".

> "The amount of damages sustained by an injured person is a question of fact, and upon an issue so difficult of quantitative determination, we do not interfere unless satisfied that the award is so 'plainly out of measure as to be clearly erroneous.'" *Carroll v. United States,* 133 F.2d 690, 693 (2nd Cir.).
>
> "And where it is clear that the jury stayed in the reasonable range, the deference due its findings of fact outweighs the deference due the trial judge's first-hand review of the evidence." *Taylor v. Washington Terminal Co.,* 409 F.2d 145 (Dist. Col. 1969):

A comprehensive study of the jurisprudence throughout the United States with reference to damages for devastating injuries reflects that the first Million dollar award in the United States was apparently in New York in 1963. More than 50 awards over One Million dollars have occurred since that time. *Appendix J lists the awards which exceed One Million dollars.* They reflect that both Courts and juries believe that a Million dollars, or more, repre-

sents only adequate compensation under today's "crystal ball" gazing into future damages.

Possibly one reason for the lack of more Million dollar awards lies in the fact that defendants and their insurors probably find it worthwhile to settle the cases, rather than risk larger verdicts, and to prevent the cases from being guidelines or authorities in future litigation. For example, the Court will find four cases listed in which settlements were made without trial for at least $1 Million in 1971, including the $1.35 Million settlement in the *Falconer* case to a 3-year old girl who lost both arms. In 1972 a settlement of $1.6 Million to a 45-year old man for permanent brain injuries in the *Bailey* case. *These are settlements, not litigated jury verdicts or findings by a judge.* They reflect that lawyers, representing their individual clients, *compromised* litigations by payment of $1 Million or more, rather than risk larger or smaller verdicts.

Moreover, these cases reflect examples where trial judges themselves have allocated $600,000 and more for pain and suffering. An example is *Harrison J. Cheramie, Jr. v. State of Louisiana,* (19th District Court, East Baton Rouge Parish, Louisiana), where the Court, without a jury, awarded $850,000 to a 32-year old quadriplegic for pain and suffering. This is more than double the amount permitted Gorsalitz under the trial court's remittitur. Yet, who can say that his injuries are more tragic or comprehensive than those of Gorsalitz?

The trial court's award of only $400,000 in the present case, for past and future pain and suffering, loss of life's enjoyments and disfigurement, allows only $10,335.92 per year. (It is interesting to note that the trial judge allowed

only $5,167.73 a year for devastating injuries sustained by the plaintiff in the first remittitur). As previously pointed out, *Schwartz v. United States,* 230 F. Supp. 536 (Eastern District of Pennsylvania, 1964) allocated $15,-067.59 per year.

Using the base figures affirmed by the Fifth Circuit, the award for pain and suffering is $890,234. If this sum is averaged over the 38.7 years representing time to date of trial and the life expectancy, the amount is $23,003.46 per year. Moreover, since the Court found plaintiff's future earnings to be $452,400 (incorrectly reducing it to an annuity), the allocation to pain and suffering would be only $684,230, an annual allowance of only $17,680.36 for the 38.7 years involved.

To illustrate the magnitude of the question involving a remittitur of a jury award by any court-determined formula, we ask the Court to consider the following proposition, using the largest amount in this case which could possibly be considered as an award for annual pain and suffering, the sum of $23,003.46. Suppose that each year from the date of trial the plaintiff was entitled to bring a separate suit, and try to a jury only the issue of his general damages suffered during the previous year for his pain, suffering, mental anguish, disfigurement and loss of life's enjoyments. Would $23,000 be excessive for that one year? Certainly not. If we followed this same procedure for Gorsalitz's life expectancy of 34.8 years as each year accrued, and asked the Court to award the sum of $23,000 for the general damages for that year, would this be excessive? We think not. Therefore, what is the judicial reason or logic which permits an interference with the jury's award covering the full life ex-

pectancy, when the Court must also consider that the risk of inflation and de-evaluation of the dollar over the next 34.8 years must now be borne by the plaintiff since he can have only one day in Court against this defendant. While a Court might now believe $23,000 a year would be excessive by present standards, can a Court conclude "as a matter of law" that within the next 20 years that $50,000 a year would not be wholly inadequate under future economic standards? Mr. Gorsalitz's life expectancy will reach the year 2000. Can this defendant, the Fifth Circuit or the Supreme Court, or some other individual robed in judicial attire, now assure Mr. Gorsalitz that in the year 2000 that $23,000 for that year would adequately compensate him for his general damages in a society where the present-day dollar may be worth only 20¢?

To this end, we have only the past to guide us. The Statistical Abstract of the United States for 1970, published by the United States Department of Commerce, and which publication this Court may take judicial knowledge as to the facts stated therein, reflects at page 231 that the index of union wages between 1945 and 1969 increased from a weekly average of $44.40 to $166.40, and while these wages were skyrocketing, the consumer price index at page 345 shows that cost of all items of living expenses increased from $85.70 in 1950 to $114.70 in 1967. If the past is the criteria for the future, an award of $890,000 for future pain and suffering might be grossly inadequate if this same case were reviewed by an appellate court 20 years from today, and may be so grossly inadequate by future standards that it would be an abuse of judicial discretion not to reverse it at plaintiff's request.

What constitutes reasonable compensation for pain and suffering involves interesting evaluation:

$350.4 Million a year—*Miller v. Southern Pacific Co.* (1963) 117 Cal. App. 2d 492, 256 P.2d 603. $1,000 a minute for 20 minutes.

$24.5 Million a year—*Brooks v. United States* (U.S. Dist. Ct., S.Car. 1967) 273 F. Supp. 619. $3,500 for an hour and fifteen minutes. Trial judge's award in a Federal Tort claim case.

$6.06 Million a year—*Florida East Coast Railway Co. v. Stewart* (Fla. Ct. App. 1962) 140 So.2d 880. $16,583 a day.

What are the "guidelines" to the remittitur practice under the Seventh Amendment? The Supreme Court should decide.

The defendant's obligation under its liability for tort damages is to "fully and adequately" compensate plaintiff for all future losses. Any question of overpayment under a jury award should be resolved against the person causing the injury. The risk should not be placed on the blameless plaintiff.

The trial court allowed only $56,000 for past medical. Appendixes F and G clearly demonstrate past medical expenses of $57,742.27. Also, "maximum recovery" requires that some allowance be made on this sum to bring to a "present value as of time of trial". If 6% is allowed (legal interest) on past payments, another $9,162.69 must be allowed, bringing the past medical loss to $66,904.96. The plaintiff's recovery under the remittitur is at least $10,904.96 short of a maximum recovery.

The same principle applies to past wage losses, requiring a minimum of $7,000 additional in interest to bring the past damages to a present value. The District Court allowed only the actual loss of wages.

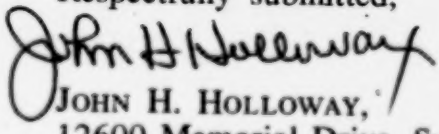
As to "future medical expenses", no allowance is made for jury deviation from estimates of the doctors based on present day costs. Juries are not bound by expert medical opinion of future expenses, and they may accept and reject it in whole or in part, and base their estimate on "sound logic and common sense" in light of their common knowledge of spiralling medical costs and inflationary trends, from the evidence before them. They do not have to accept estimates "based on present day costs", for they must compensate fully the plaintiff for all probable contingencies with no crystal ball, but only the past and present for guides. *Hood v. Texas Indemnity Ins. Co.*, Tex. Sup. Ct., 290 S.W.2d 345.

The questions presented by this case are of great and recurring significance in the orderly and just administration of personal injury litigation in the federal courts. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the historic and constitutional aspects of entrusting the assessment of damages to the jury, rather than to the trial court, make this case a peculiarly appropriate one for the exercise of this Court's diseretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,



JOHN H. HOLLOWAY,
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Attorney for Petitioner

Certificate of Service

By my signature above, I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been served on attorneys representing respondent by United States Mail, postage prepaid, on this the 29th day of April, 1972, and intervenor, indicated below:

Mr. B. Jeff Crane, Jr.
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APPENDIX A

IN THE

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 65-H-858

RICHARD WILLIAM GORSALITZ,
Plaintiff,

VS.

OLIN MATHIESON CHEMICAL CORPORATION,
Defendant,

VS.

GENERAL ELECTRIC COMPANY,
Third Party Defendant.

John H. Holloway, of Houston, Texas; for plaintiff.

Vinson, Elkins, Searls & Connally (B. Jeff Crane, Jr.), of Houston, Texas; for defendant Olin Mathieson Chemical Corporation.

Fulbright, Crooker, Freeman, Bates & Jaworski (Sam H. Hood), of Houston, Texas; for Third Party Defendant, General Electric Company.

Barrow, Bland & Rehmet (Vincent W. Rehmet), of Houston, Texas; for Intervenor Electric Mutual Liability Insurance Company.

MARCH 20, 1969

Memorandum:

This is a suit for damages for personal injuries sustained by the plaintiff while engaged in the repair of

electrical equipment at defendant Olin Mathieson Chemical Corporation's plant in Lake Charles, Louisiana. Plaintiff was in Lake Charles at the direction of his employer, third party defendant General Electric Company, from which Olin seeks indemnity. The case was tried before a jury commencing on September 30, 1968. On October 10, 1968, the jury returned a verdict submitted on interrogatories, finding that the defendant was negligent in fifteen respects; that such negligence was the proximate cause of the injury; that plaintiff was not contributorily negligent in any respect; that the work in which the plaintiff was engaged was not part of the regular trade, business, or occupation of defendant Olin; and that damages in the sum of $1,380,000 were necessary to compensate the plaintiff for his injury.

The case is now before the court on (1) plaintiff's motion for judgment on the verdict; (2) defendant Olin's motion for judgment notwithstanding the verdict and in the alternative for a new trial based upon excessiveness of the verdict; and (3) third party defendant G. E.'s motion to dismiss the third party complaint or, in the alternative, for a directed verdict on the third party complaint in its favor.

I.

The court will first consider Olin's motion for new trial pursuant to Fed. R. Civ. P. 59, which is grounded upon the allegation that the verdict of $1,380,000 is excessive. Since the plaintiff moves only that judgment in accordance with the verdict be entered, his motion need not be considered. A denial of Olin's motion would ipso facto require that plaintiff's motion for judgment be granted.

When it is alleged that the jury has returned a verdict which is excessive, the court may not simply order a reduction of damages. It may, however, grant a new trial conditioned upon the plaintiff's agreeing to remit a stated amount. Phoenix Indem. Co. v. Givens, 263 F.2d 858, 863 (5 CA 1959); Bucher v. Krause, 200 F.2d 576, 586 (7 CA), cert. denied, 345 U.S. 997 (1953); see generally 6A Moore's Federal Practice para. 59.08 (6) and cases there cited. Whether the court should grant or deny the motion for new trial in a case of this type is addressed to its discretion, but the discretion must be "sound" and not "arbitrary" and must be "exercised in the light of the record in the case and within the limits prescribed by reason and experience." Virginian Ry. v. Armentrout, 166 F.2d 400, 407 (4 CA 1948); see also Dagnello v. Long Island R.R., 289 F.2d 797 (2 CA 1961). Moreover, the court has not merely a power to exercise its discretion; it is also a duty in a proper case. Afro-American Pub. Co. v. Jaffe, 366 F.2d 649, 662 (D.C. Cir. 1966).

The court first notes that the verdict in this case is one of the largest (if not the largest) ever received by a single plaintiff in a personal injury action. That fact, of course, is not reason in itself for ordering a new trial. See Hogue v. Permanent Mold Die Co., 177 F. Supp. 229, 234 (E.D. Mich. 1959). Other factors are to be considered, and in this vein, the authorities are replete with definitions of the point at which a verdict bcomes excessive. The court is told that if the verdict is "grossly excessive," Butts v. Curtis Pub. Co., 225 F. Supp. 916, 920 (N.D. Ga. 1964), aff'd, 351 F.2d 702 (5 CA 1965), aff'd 388 U.S. 130 (1967), "monstrous," "inordinate," "shocking to the judicial conscience," "outrageously excessive," Dagnello v. L.I.R.R., 289 F.2d 797, 802 (2

CA 1961), a "miscarriage of justice to permit it to stand," Berner v. British Commonwealth Pacific Airlines, Ltd., 230 F. Supp. 240, 244 (S.D. N.Y. 1964), rev'd on other grounds, 346 F.2d 532 (2 CA 1965), cert. denied, 382 U.S. 983 (1966), or merely "larger in amount than the judge thinks it justly ought to be," Sunray Oil Corp. v. Allbritton, 188 F.2d 751 (5 CA), cert. denied, 342 U.S. 828 (1951), the court should grant a new trial or, in lieu thereof, requires a remittitur. It is obvious that, in Judge Learned Hand's words, "to decide cases by such tenuous realities . . . is thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements." Miller v. Maryland Cas. Co., 40 F.2d 463, 465 (2 CA 1930). But the guidelines have not yet reached a tensile strength any greater than Judge Hand's "gossamer strands." The court is forced to ask simply whether the verdict is fair and reasonable.

Turning to the facts of this case, and viewing the evidence in a light most favorable to the plaintiff, it is evident that insofar as past and future wages and medical expenses are concerned, the jury was justified in arriving at a large figure.

Loss of ernings from date of injury to trial.

On the date of the injury the plaintiff had earned $9,832.56 for the ten-month period prior to November 10, 1964. It was therefore reasonable for the jury to believe that he would have earned $11,799.06 had he worked the entire year. Using that figure to represent yearly wages, and excluding allowance for wage increases during the period, it was reasonable for the jury to conclude that his lost wages from the date of injury to trial (three years, eleven months) totaled $46,213.

Loss of earnings from time of trial for life expectancy.

As to future loss of earnings, there was testimony to the effect that were Mr. Gorsalitz still employed in the same occupation, he would be earning $13,000 per year. It was shown that he had a life expectancy of 34.8 years and that he is permanently and totally disabled, with which the court agrees. It could be argued, therefore, that future loss of earnings would total $452,400 (34.8 × $13,000), excluding an allowance for increased wage rates in future years. However, the court's charge instructed the jury that it should "award only such sum of money *if paid now in cash* as would reasonably compensate him for such damages . . ." No evidence was presented concerning what amount, if presently paid in cash, would provide an annuity of $13,000 each year for 34.8 years, but this often happens, and in such instances the judge and jury must arrive at a figure based upon common sense. The court believes that the sum of $250,000 will reasonably compensate the plaintiff for loss of future earnings for the duration of his life. It might be noted that this figure is in excess of the amount which would be called for by the standard annuity tables.

Medical expenses incurred to date of trial.

Past medical expenses were shown to total approximately $56,000 at the time of trial. The medical testimony received fully warranted the jury in concluding that those expenses were reasonable and necessary.

Medical expenses from date of trial for life expectancy.

The testimony concerning future medical expenses was extensive. The plaintiff's plastic surgeon testified that a minimum of thirty-three more surgical procedures would

be required, totaling $36,150. He stated, however, that that amount was a minimum; the charges could be twice that with expected complications. Evidence was received which demonstrated that such complications were highly probable. It was therefore reasonable for the jury to believe that $72,300 would be required for future plastic surgery and hospitalization.

A dental surgeon testified that with the bone deterioration around the plaintiff's mouth, four surgical procedures each year would be needed to remove bone particles. The surgical fees for these procedures would amount to approximately $700 per year for the remainder of his life. In addition, prosthetic appliances and hospital and anesthetist charges would total approximately $1,200 per year. The jury could thus determine that an additional $66,120 in future medical expenses was probable.

The foregoing amounts total $490,633, which leaves $889,367 attributable to pain and suffering.

Pain and suffering, past and future.

The item of pain and suffering is obviously quite large. In determining whether it is inordinately so, the court is again mindful that damages are primarily within the province of the jury and that the court should avoid invading that field. The ultimate responsibility is, however, that of the court, which must inquire whether such a sum was the result of sympathy, passion, or prejudice on the part of the jury. See Dellaripa v. N.Y., N.H., & H. R.R., 257 F.2d 733, 735 (2 CA 1958); Schwartz v. United States, 230 F. Supp. 536, 543 (E.D. Pa. 1964), aff'd, 381 F.2d 627 (3 CA 1967); Caporossi v. Atlantic City, 220 F. Supp. 508 (D. N.J. 1963), aff'd, 328 F.2d 620

(3 CA), cert. denied, 379 U.S. 825 (1964); Sunray Oil Corp. v. Allbritton, supra; Butts v. Curtis Pub. Co., supra.

The facts of this case were particularly of a type conducive to arouse the sympathy of the jury. Mr. Gorsalitz's injury and his subsequent medical treatments were extremely serious. The injury occurred when the plaintiff fell against a high voltage transformer; the entire right side of his head, the right arm and hand were severely burned. Dr. S. Baron Hardy, a specialist in plastic and reconstructive surgery, was called to testify on behalf of his patient. He testified that when he first saw the plaintiff on the afternoon of the injury, the plaintiff was comatose and in a critical condition. He was breathing through a tracheotomy tube due to swelling and inflammation of the face and neck. For the first forty-eight hours the principal treatment was for shock. Thereafter the burn treatments began. It soon became apparent that all the tissue on the right side of plaintiff's head and face had become necrotic; circulation in the unburned portion of the face was disturbed and could not sustain the tissues. During this time, composing several weeks following the injury, the plaintiff was either comatose or in a confused condition. When conscious he was in great pain and was administered pain medication often. During that time the first skin grafts, to the neck, were performed. By May of 1965 all of the tissue and part of the bone of the right side of plaintiff's face had to be removed. To cover the exposed area, a massive skin graft was moved from the abdomen. The procedure entailed a series of stages over about a month's time, and caused the plaintiff extreme discomfort. For approximately a year he was forced to breathe through the

tracheotomy tube, and was fed pre-digested food through a tube to his stomach, since he had no teeth or jaw bone joint on the right side of his face.

Plaintiff was first discharged from the hospital in July of 1965, but returned in August for further surgical procedures. It is unnecessary to recount all the operations performed thereafter. It is sufficient to state that there were many, requiring varying periods of hospitalization up to the date of trial.

The plaintiff was present each day of the trial; the severe disfigurement of his face was thus constantly before the jury as mute evidence of the terrible injury he had sustained four years prior.

In Hogue v. Permanent Mold Die, Co., supra, a verdict of $225,000 was returned by a jury for the loss of sight in one of the plaintiff's eyes. In considering whether the award was excessive, the district judge in an excellent opinion wrote:

> "It is recognized at once that the size of this verdict undoubtedly was the result of the jury's attempt to measure in dollars the loss that comes to any human being from being substantially deprived of possibly the most valuable of all human senses, that of sight. It will be recognized, too, that no normal man would voluntarily take any amount of money in exchange for the loss of his eyesight. That, however, would not justify a completely fantastic award of damages for such a tragedy. The fact that voluntarily one would not accept a million dollars in exchange for his eyes does not argue that a recovery of one million dollars should be sustained, should a jury make such an award."

Id. at 235.

The court agrees that no normal person would take any sum of money in exchange for the pain and disfigurement that Mr. Gorsalitz has suffered. Surely the plaintiff would not exchange the horror of the last four years, and the disabilities certain to linger on until his death, for fifty or one-hundred millions of dollars. Nor would any juror do differently. However, the inquiry here must be whether, based upon the record of the case, the court believes that the jury was over-zealous in attempting to compensate the plaintiff for something which would be to them incompensable. The difficulty of the task is at once apparent. Nevertheless, it would be a dereliction of the court's duty to allow the full amount to stand if, in its considered opinion, the sum reflects the sentiments of an overly compassionate jury.

It is the court's opinion that $889,367 allocable to pain and suffering is excessive, the result of undue sympathy on the part of the jury. It is further the court's opinion that the sum of $200,000, which approximates the maximum sum of past and future medical expenses, is a reasonable amount to award the plaintiff for pain and suffering. The court therefore believes that the verdict should be reduced from $1,380,000 to $690,633. If the plaintiff elects to accept such reduction by filing an appropriate remittitur within twenty days from this date, the motion for new trial will be denied and the verdict, thus reduced, will remain in force. If such remittitur is not filed, the verdict will be set aside and motion for new trial will be granted. In either event, the defendant Olin's motion for judgment notwithstanding the verdict will be denied.

II.

[Portions of Opinion on Indemnity Omitted
as Not Embraced in this Appeal]

For the aforementioned reasons, the court concludes that (1) the motion for judgment notwithstanding the verdict will be denied; (2) the motion for new trial will be denied upon the court's receipt of remittitur as outlined; (3) the motion for new trial will be granted unless remittitur is filed within twenty days; and (4) judgment should be entered in favor of the third party defendant on the issues raised by the third party complaint.

The clerk will notify counsel to draft and submit orders and judgments accordingly.

/s/ JOE INGRAHAM
United States District Judge

APPENDIX B

IN THE

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 65-H-858

RICHARD WILLIAM GORSALITZ, Plaintiff

v.

OLIN MATHIESON CHEMICAL CORPORATION, ET AL., Defendants

(Filed March 26, 1971)

John H. Holloway, of Houston, Texas; for plaintiff.

Vinson, Elkins, Searls & Smith (B. Jeff Crane, Jr.), of Houston, Texas; for defendant Olin Mathieson Chemical Corporation.

Barrow, Bland & Rehmet (Vincent W. Rehmet), of Houston, Texas; for Intervenor Electric Mutual Liability Insurance Company.

Memorandum:

In this personal injury suit for damages filed by plaintiff, Richard William Gorsalitz, the jury found the defend-

ant, Olin Mathieson Chemical Corporation, guilty of negligence and assessed damages in the amount of $1,380,000. After denial of numerous post-trial motions and imposition upon the plaintiff of conditional remittitur in the amount of $689,637, which was filed under protest, both parties appealed.

While affirming the judgment of liability against Olin Mathieson Chemical Corporation, the Court of Appeals determined that this Court utilized an improper legal standard in testing the excessiveness of the jury's verdict and thus remanded that part of the case for redetermination of the amount of conditional remittitur, applying the proper test.[1]

In its opinion of June 17, 1970, the Court of Appeals determined that this court substituted its view of a reasonable amount to award the plaintiff for the verdict of the jury in computing the amount of conditional remittitur. The proper test, said the court, is the maximum amount which the jury could reasonably find.

Pursuant to the mandate of the Court of Appeals on remand and having considered the briefs of counsel submitted in response thereto, this court has reexamined the record in the instant case to determine the maximum amount, upon the evidence presented, which the jury could reasonably find to be compensatory of the plaintiff's loss.

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1. A complete history of the foregoing litigation is chronicled in this court's memorandum opinion of March 20, 1969 (unpublished) and the opinion of the Court of Appeals in *Gorsalitz v. Olin Mathieson Chemical Corporation*, 429 F.2d 1033 (5th Cir., 1970) [No. 27807, June 17, 1970].

It is noted initially that the Court of Appeals expressly held that this court did not err in conditionally requiring *some* remittitur. With that express holding in mind and utilizing the legal standard enunciated by the Court of Appeals, the court makes the following findings:

LOSS OF EARNINGS FROM DATE OF INJURY TO TRIAL

The maximum amount the jury could reasonably find to be compensatory of plaintiff's loss of earnings from the date of injury to the time of trial is $46,213 [$11,800 per annum for 3 years and 11 months].

LOSS OF EARNINGS FROM TIME OF TRIAL FOR LIFE EXPECTANCY

As to future loss of earnings, the evidence upon trial would not support a jury finding in excess of $13,000 per annum for the remainder of plaintiff's life. Plaintiff's life expectancy was shown to be 34.8 years. Considering the plaintiff's injuries and medical prognosis, the jury could not reasonably find a life expectancy in excess of this figure. Thus, the total amount for loss of future earnings would be $452,400. However, the jury was instructed to award only such sum of money *if now paid in cash* as would reasonably compensate the plaintiff for his loss. Taking into consideration the decreased buying power of the dollar at present day and other intangibles that a properly functioning jury may consider in assessing an award for loss of future earnings, I find that the maximum amount the jury could reasonably determine to be compensatory of plaintiff's loss of future earnings, if now paid in cash, is $246,396.

MEDICAL EXPENSES INCURRED TO DATE OF TRIAL

There seems little dispute that $56,000 represents the maximum amount that could be reasonably awarded for this element of damage.

MEDICAL EXPENSES FROM DATE OF TRIAL FOR LIFE EXPECTANCY

Considering the very real probability of expected complications in plaintiff's future medical treatment, the jury could have reasonably found the maximum amount of future medical expenses to be $138,420.

PAIN, SUFFERING AN MENTAL ANGUISH— PAST AND FUTURE

This court has reviewed most critically the evidence bearing upon this element of damage. Notwithstanding the seriousness of plaintiff's injuries, the accompanying mental anguish, physical pain, embarrassment, humiliation, disfigurement and inconvenience, and the torment both before the trial and that to be encountered in the future in the process of some 33 surgical procedures, the court finds that the maximum amount (the uppermost limit of a permissible range) which a properly functioning jury could reasonably find upon the evidence presented in this case for past and future pain, suffering and mental anguish is $400,000.

As this court stated in its original memorandum opinion of March 20, 1969, the jury was over zealous in attempting to compensate the plaintiff for something which to them would be incompensable. The court con-

tinues in its belief that the verdict was excessive, the result of undue sympathy on the part of the jury.

The damages above discussed and found by the court to be the maximum figure which a reasonable jury could award under the evidence presented total $887,029. For the reasons previously stated, the court believes that the verdict should be reduced from $1,380,000 to $887,029. If the plaintiff elects to accept such reduction by filing an appropriate remittitur within twenty (20) days from this date, a new trial on the issue of damages will be denied and the verdict, thus reduced, will remain in force. If such remittitur is not so filed within the prescribed time, the verdict will be set aside and a new trial on the issue of damages will be ordered.

With regard to apportionment of the verdict as entered between plaintiff Gorsalitz and intervenor, Electric Mutual Liability Insurance Company, counsel for all parties shall stipulate and agree as to the amount required to recompense intervenor for previous sums expended in plaintiff's behalf. Should counsel be unable to agree, such points of disagreement shall be set forth specifically and with particularity.

The Clerk will notify counsel to draft and submit judgment accordingly.

Done at Houston, Texas, on this the 26th day of March, A. D. 1971.

/s/ JOE INGRAHAM
United States Circuit Judge
Sitting by Designation

CERTIFIED

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27807

RICHARD WILLIAM GORSALITZ,
Plaintiff-Appellee-Cross Appellant,
versus
OLIN MATHIESON CHEMICAL CORPORATION,
Defendant-Appellant-Cross Appellee,
versus
GENERAL ELECTRIC CORPORATION,
Third Party Defendant-Appellee,
ELECTRIC MUTUAL LIABILITY INSURANCE COMPANY,
Intervenor-Appellee.

Appeals from the United States District Court for the Southern District of Texas

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(June 17, 1970)

Before BROWN, Chief Judge, and RIVES and GEWIN, Circuit Judges.

Rives, Circuit Judge: The plaintiff, Richard W. Gorsalitz, sued the defendant, Olin Mathieson Chemi-

cal Corporation, for damages to compensate for extremely severe personal injuries sustained by the plaintiff while working on the premises of the defendant in Lake Charles, Louisiana.[1] The defendant Olin instituted a third party action for indemnity against the plaintiff's general employer, General Electric Company. The issues between the plaintiff and the defendant Olin were tried to a jury which returned a special verdict under Rule 49(a), Fed. R. Civ. P., answering Interrogatory No. 1, to the effect that the defendant was negligent in fifteen different respects; Interrogatory No. 2, that such negligence proximately caused the plaintiff's injuries; and Interrogatory No. 3, that plaintiff was not guilty of any act of contributory negligence.

The final two interrogatories and the jury's answers were as follows:

"*Interrogatory No. 5:*

"Do you find that the work which the plaintiff was doing at the time of the occurrence made the basis of this suit was part of the regular trade, business or occupation of the defendant Olin Mathieson Chemical Corporation?

"You will answer 'Yes' or 'No.'

"Answer: No.

"*Interrogatory No. 6:*

"What amount of money if now paid in cash, do you find from a preponderance of the evidence, will fairly and reasonably compensate the plaintiff,

1. Electric Mutual Liability Insurance Company intervened to recover workmen's compensation benefits paid to plaintiff.

Richard William Gorsalitz, for the injury sustained by him on November 10, 1964?

"You will answer by stating the amount in dollars and cents.

"Answer: $1,380,000."

The defendant Olin moved under Rule 50(b) for judgment n.o.v. and, in the alternative, for a new trial. Also, as third party plaintiff, the defendant moved for judgment for indemnity against the third party defendant, General Electric; which, in turn, moved to dismiss the third party complaint or, in the alternative, for a directed verdict in its favor.

The district court denied the defendant's motion for judgment n.o.v. It found that the verdict should be reduced from $1,380,000.00 to $690,633.00 and that, if plaintiff filed an appropriate remittitur within twenty days, the motion for new trial would be denied. Otherwise the verdict would be set aside and the motion for new trial would be granted. The plaintiff filed the remittitur under protest and reserved his right to appeal. The court entered judgment for the plaintiff Gorsalitz (and the intervenor Electric Mutual) against the defendant Olin for $690,633.00 with interest from the date of the judgment. It denied Olin's claim for indemnity and entered judgment in favor of the third party defendant, General Electric.

Olin appeals both from the judgment against it in favor of the plaintiff and the intervenor, and from the judgment denying its claim of indemnity against General Electric. Gorsalitz appeals from the final judgment and from the order conditionally requiring him to file a remittitur.

Olin's Appeal Against Gorsalitz

[Omitted as not material to this Appeal]

Gorsalitz's Appeal

We come next to the several questions presented by Gorsalitz's appeal.

A.

Does the granting of a remittitur in jury cases violate the Seventh Amendment's command that "no fact tried by a jury shall be otherwise re-examined * * * than according to the rules of the common law"?

We agree with Professor Moore that the use of remittitur by federal district courts "has become so universal * * *, and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by *Erie-Tompkins,*" 6A Moore's Federal Practice, 2nd ed., ¶59.05[3], pp. 3739, 3740 (footnotes omitted).

The Supreme Court has repeatedly approved the practice. In *Northern Pacific R.R. Co. v. Herbert,* 1886, 116 U.S. 642, 646, 647, Justice Field speaking for the Court said:

> "2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of

the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand."

That holding and the remittitur practice were fully discussed by the elder Justice Harlan in *Arkansas Cattle Co. v. Mann,* 1889, 130 U.S. 69, 72-76, saying in part:

> "The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpaply or outrageously excessive."

130 U.S. at 74.[12]

Remittitur is reconciled with the Seventh Amendment by Mr. Justice Sutherland speaking for the Court in *Dimick v. Schiedt,* 1935, 293 U.S. 474, 486:

> "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability

12. Other Supreme Court cases approving the practice are collected by Professor Moore in 6A Moore's Federal Practice, ¶59.05 [3], p. 3740 n. 9.

> and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence."[13]

In theory at least the plaintiff's constitutional right of trial by jury is preserved.

B.

Was there sufficient factual basis to justify the trial court in conditionally requiring *any* remittitur?

The ground of defendant Olin's motion for new trial relating to damages reads as follows:

> "The amount of damages found by the jury is so excessive and exorbitant as to demonstrate passion and prejudice on the part of the jury against this Defendant and is wholly unsupported by the evidence; in this connection, Defendant would respectfully show the Honorable Court that a finding of damages in excess of $600,000 is excessive."

There was no claim of any improper argument or of any appeal to passion or prejudice in the introduction of evidence or the conduct of the trial. Instead, the district court found that the facts of the case, the se-

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13. Professor Moore notes that,
"This justification has been thoroughly analyzed and attacked in an excellent article by Professor Carlin, Remittiturs and Additurs (1942) 49 W Va LQ 1." 6A Moore's Federal Practice, ¶59.05[3], p. 3738 n. 6.

verity of the injury and the medical treatment aroused undue sympathy on the part of the jury.[14] In demonstrating the inherent and unavoidable appeal to the sympathy of the jury, the learned trial judge wrote in his memorandum:

> "The facts of this case were particularly of a type conducive to arouse the sympathy of the jury. Mr. Gorsalitz's injury and his subsequent medical treatments were extremely serious. The injury occurred when the plaintiff fell against a high voltage transformer; the entire right side of his head, the right arm and hand were severely burned. Dr. S. Baron Hardy, a specialist in plastic and reconstructive surgery, was called to testify on behalf of his patient. He testified that when he first saw the plaintiff on the afternoon of the injury, the plaintiff was comatose and in a critical condition. He was breathing through a tracheotomy tube due to swelling and inflammation of the face and neck. For the first forty-eight hours the principal treatment was for shock. Thereafter the burn treatments began. It soon became apparent that all the tissue on the right side of plaintiff's head and face had become necrotic; circulation in the unburned portion of the face was disturbed and could not sustain the tissues. During this time, composing several weeks following the injury, the plaintiff was either comatose or in a confused condition. When conscious he was in great pain and was administered pain medication often. During that same time the first grafts, to the neck, were performed. By May of 1965 all of the tissue and part of the bone of the right side of plaintiff's face had to be removed. To cover the exposed area, a massive skin graft was moved from the abdomen. The

14. At another place in its memorandum, the district court expressed that "* * * in its considered opinion, the sum reflects the sentiments of an overly compassionate jury."

procedure entailed a series of stages over about a month's time, and caused the plaintiff extreme discomfort. For approximately a year he was forced to breathe through the tracheotomy tube, and was fed pre-digested food through a tube to his stomach, since he had no teeth or jaw bone joint on the right side of his face.

"Plaintiff was first discharged from the hospital in July of 1965, but returned in August for further surgical procedures. It is unnecessary to recount all the operations performed thereafter. It is sufficient to state that there were many, requiring varying periods of hospitalization up to date of trial.

"The plaintiff was present each day of the trial; the severe disfigurement of his face was thus constantly before the jury as mute evidence of the terrible injury he had sustained four years prior."[15]

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15. With some additions, this description may serve the additional purpose of explaining the extent of the injuries. Part of the lower right jaw has been removed and the upper jaw bone is exposed. All of his teeth on the lower right jaw have been removed. He can't go out to dinner because "I'm messy, trying to get it stuffed in the hole. I can't drink anything unless it's through a straw. I don't have any teeth on this side. I only chew on this side. It takes me three times as long to eat as what it does a normal person." The lack of soft tissue and gum tissue causes poor nutrition and pieces of bone from the upper right jaw will continue to slough out. Gorsalitz's oral surgeon testified: "Sometimes those bones will slough out by themselves, but during the process of sloughing out the patient goes sometimes through lots of pain, and if we are going to wait for this condition to take care of by itself it might require too long of a time.

"In addition to this, this piece of bone which is decaying, becomes infected, might damage the remaining of the soft tissue or hard structure tissue. This is why we feel that it is better according with the clinical adjustment at the time we see the patient, if it is wise to wait or maybe operate."

The operations are performed under local anesthetic. The patient continues mentally aware and feels some pain and discomfort. The surgeon foresees a probability of future operations to remove sharp pieces of bone and prevent pain and discomfort every three to six months:

This Court may review the district court's ruling on motion for new trial only for an abuse of discretion. *Whiteman v. Pitrie,* 5 Cir. 1955, 220 F.2d 914, 919, and cases there cited.[16]

"A. Unless an operation could be done to cover this area of the sinus that is exposed. When I say 'exposed,' I mean when you see in Mr. Gorsalitz' mouth I can see the oral cavity and also you can see a big cavity into the sinus cavity. If this Area is closed, and by 'closed' I mean you have to do some sort of grafting of some sort of soft tissue somewhere in the body or perhaps the mouth itself and try to close the entire cavity.

"By closing the maxillary sinus perhaps we might get additional nutrition to cover the bone and maintain the bone in good condition, and this way perhaps we may not have any more pieces of bone working out.

* * * *

"Q. Doctor, based on reasonable medical probability, what are some of the problems, if you are unable to stop this deterioration of the bone, that Mr. Gorsalitz will have in the future that you can foresee with any reasonable probability?

"A. The probabilities that the bone is just going to continue decaying, and whatever bone he has left, especially in this area of the sinus, some of the good bone remaining now might get involved, might get decay, and this bone here in the cheek is supporting the eye. The chances are, as my experience with some other patients before, not in this particular type of burn or injury, that there might be some eye problems associated with this.

"Q. What are those problems which you could reasonably expect, again based on reasonable medical probability, in Mr. Gorsalitz' case?

"A. He will gradually lose sight of his right eye due to the infection in the wall of the eye, and the bone supporting the eye structure."

Gorsalitz's right middle ear and his external ear have been destroyed. His seventh cranial nerve which supports motor functions to most of the muscles of expression of the face was destroyed. An opening into the maxillary sinus has persisted since his injury and food can get in and come out of his nose. He complains of headaches and dizziness on occasions. In a spell of dizziness shortly before the trial, he fell and broke his leg.

16. Of course, we may reverse for a strict error of law committed in the exercise of the district court's discretion, but that is rarely found.

In a recent case of this kind, *Taylor v. The Washington Terminal Company,* D.C. Cir. 1969, 409 F.2d 145, *cert. den.* 396 U.S. 835, Judge Skelly Wright has evolved a practical test of "abuse of discretion." We quote at some length, omitting footnotes:

> "It is by now standard doctrine that such orders may be reviewed for abuse of discretion, even when based upon such broad grounds as the trial judge's conclusion that the verdict was excessive or was against the weight of the evidence. There has been much discussion of the content which should be given to the elusive phrase 'abuse of discretion,' with the weight of learning against appellate reversal except in relatively rare cases.
>
> "This learning has largely arisen from consideration of cases in which motions for new trial—especially on the ground of excessive verdict—have been *denied.* Two factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.
>
> "Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. However, where, as here, the jury as primary fact-finder fixes a quantum, and the trial judge indi-

cates his view that it is excessive by granting a remittitur, the two factors oppose each other. The judge's unique opportunity to consider the evidence in the living courtroom context must be respected. But against his judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance—the jury—has evaluated the facts differently.

"In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated that a new trial motion will not be granted unless the 'verdict is so unreasonably high as to result in a miscarriage of justice,' or, most recently, unless the verdict is 'so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.'

"At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within 'the maximum limit of a reasonable range.' "

409 F.2d at 147-149.

We think the same test should be applied in deciding whether the trial court erred in requiring some remittitur as a condition for denying a motion for new trial. Applying that test in the light of the present record, we think that the trial judge, in the exercise of his necessarily broad discretion, could properly find that *some* part of this large verdict resulted from undue sympathy on the

part of the jury. We hold, therefore, that the district court did not err in conditionally requiring *some* remittiur, and pass on to the question of the amount of remittitur required.

C.

What action should this Court take as to the amount of remittitur?

The jury answered Interrogatory 6 with one lump sum, $1,380,000.00. In its memorandum the district court undertook to consider various elements of damage. As to "loss of earnings from date of injury to trial," it expressed the view that it was reasonable for the jury to award $46,213.00; as to "loss of earnings from time of trial for life expectancy," it stated, "The court believes that $250,-000.00 will reasonably compensate the plaintiff for loss of future earnings for the duration of his life"; as to "medical expenses incurred to date of trial," the court found a figure of $56,000.00; as to "medical expenses from date of trial for life expectancy," the court found that the jury could determine that an additional $66,120.-00 in future medical expenses was probable. The court then said that "The foregoing amounts total $490,633.00 which leaves $889,367.00 to pain and suffering," and then considered the elements of "pain and suffering, past and future," finally concluding:

> "It is the court's opinion that $889,367 allocable to pain and suffering is excessive, the result of undue sympathy on the part of the jury. It is further the court's opinion that the sum of $200,000 which approximates the maximum sum of past and future medical expenses, is a reasonable amount to award the plaintiff for pain and suffering."

Gorsalitz, as appellant, vigorously attacks the court's computations of the various items of damages. We pretermit consideration of such detailed criticisms of the court's rationale because we agree with Gorsalitz's overall attack that the court committed an error of law in failing to apply the proper test of excessiveness, which we hold was the maximum which the jury could reasonably find. We agree with the view expressed in 3 Barron & Holtzoff, Federal Practice & Procedure (Wright ed.) §1305.1, p. 376:

> "There are some differences of opinion as to the standard by which th court should be guided in determining the amount of the remittitur. One theory is that an excessive verdict should be reduced to the minimum amount which the jury might have awarded, since award of any greater sum deprives the defendant of his right to a jury trial. Other courts have felt free to reduce the verdict, by remittitur, to that amount which the court itself considers the jury should have allowed. A final theory is that the jury by its excessive verdict intended to award the maximum and defendant cannot complain of any judgment within the permissible limits. This theory permits reduction only to the highest amount which the jury could properly have awarded. It is the only theory which has any reasonable claim of being consistent with the Seventh Amendment." [Footnotes omitted.]

We need not write at length on this standard applicable to determining the amount of remittitur because it has been so fully and ably discussed by Judge Rubin in *Glazer v. Glazer,* E.D. La. 1968, 278 F.Supp. 476, 478-482. We adopt the rationale of Judge Rubin in that part of his opinion.

In the present case the district court simply substituted its view of a reasonable amount to award the plaintiff for the verdict of the jury. The forceful language of Mr. Justice Sutherland employed in another context in *Dimick v. Schiedt, supra,* would aptly describe the result of an affirmance of the amount of remittitur required by the district court:

> "To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.' "

293 U.S. at 487.

D.

We come next to Gorsalitz's contention that interest on the final judgment should run from the date of return of the jury verdict.

Rule 58, Fed.R.Civ.P., prescribes the respective duties of the court and of the clerk as to the entry of judgment upon a verdict of a jury. Upon a general verdict for a sum certain "the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction of the court." "Upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it." Rule 58 further provides that "[a] judgment is effective only when entered as provided in Rule 79(a)."

28 U.S.C. 1961 provides that "interest shall be calculated from the date of the entry of the judgment, at

the rate allowed by State law." Article 5072 of Vernon's Annotated Texas Statutes provides in part that, "All judgments in the courts of this State shall bear interest at the rate of 6% per annum from and after the date of judgment * * *."

The jury verdict was returned on October 10, 1968. One week later, on October 17, 1968, the defendant Olin filed its motion for judgment n.o.v. and in the alternative for a new trial. The district court entered its memorandum opinion indicating that it would require a remittitur as a condition for denying the motion for new trial on March 20, 1969. The plaintiff Gorsalitz filed his remittitur under protest on April 8, 1969. The final judgment for $690,633.00 "with interest thereon from this date at the rate of six per cent (6%) per annum until paid" was entered on April 18, 1969.

A similar question was decided by the Second Circuit in *Murphy v. Lehigh Valley R. Co.*, 1946, 158 F.2d 481, 485:

> "Had there been no pending motion to set aside the verdict judgment could, and should, have been entered forthwith but [sic] the clerk in accordance with the Rule 58, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. But after the motion was made it had to be decided before any judgment could be entered. The motion was granted conditionally with leave to the plaintiff to file a remittitur. This was done and the court made the judgment order on October 11, 1945. That was when the notation of the judgment in the civil docket should have been made and it became the judgment day. Rule 79(a). Since there was no date previous to October 11, 1945, on which the judgment could

> have, and should have, been entered it became the date from which interest was allowable. Louisiana & Arkansas R. Co. v. Pratt, 5 Cir., 142 F.2d 847."

Whatever might be our ruling if we consider the procedural rules alone, a more substantial question as to the peculiar nature of the jury's verdict must be considered in this case. Interrogatory No. 6 and the jury's answer have been quoted early in this opinion. The interrogatory asked what amount of money *"if now paid in cash"* will reasonably compensate the plaintiff. The court instructed the jury:

> "In arriving at and assessing the damages to which the Plaintiff Gorsalitz is entitled, if any, you will award only such sum of money *if paid now in cash* as would fairly and reasonably compensate him for such damages as you may find, from a preponderance of the evidence, he has suffered as a direct and proximate result of the accident in question * * *." [Emphasis added.]

Thus the jury's verdict was based upon the premise that the amount answered be "now paid in cash." Upon this substantive basis, we think that the amount ultimately awarded by the court's final judgment should draw interest from October 10, 1968, the date of the jury's verdict.

Olin's Appeal Against General Electric

[Omitted as Not Involved in This Appeal]

Conclusion

Insofar as concerns either Olin's appeal against Gorsalitz or Olin's appeal against General Electric, the judg-

ments are affirmed. As to Gorsalitz's appeal, the respective amounts of the remittitur and of the final judgment are vacated and the case is remanded for redetermination of the amount of conditional remittitur and the entry of such orders and judgments as are not inconsistent with the foregoing opinion. The costs of appeal are taxed against Olin.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED.

ORDER ENTERED AUGUST 18, 1970

Before BROWN, Chief Judge, and RIVES and GEWIN, Circuit Judges.

PER CURIAM: *The Petition for Rehearing of Olin Mathieson Chemical Corporation is DENIED* and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2027

RICHARD WILLIAM GORSALITZ,
Plaintiff-Appellant,

versus

OLIN MATHIESON CHEMICAL CORPORATION,
Defendant-Appellee,

ELECTRIC MUTUAL LIABILITY INSURANCE COMPANY,
Intervenor.

Appeal from the United States District Court for the Southern District of Texas

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(February 4, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: This is the second appeal arising from a jury verdict secured by appellant Gorsalitz for permanent injuries incurred by reason

of Olin's negligence. The original verdict was for $1,380,000. The District Court required a remittitur of all amounts in excess of $690,633, and both parties appealed. This court affirmed on liability.[1] As to damages, we held that the District Judge could properly find that some part of the verdict resulted from undue sympathy on the part of the jury and that, therefore, he did not err in conditionally requiring some remittitur, but that in determining the amount thereof he employed the wrong standard, substituting his own view of a reasonable award for the verdict of the jury. We vacated the respective amounts of the remittitur and of the final judgment and remanded for redetermination of the amount of remittitur under the correct standard of excessiveness, which we held to be the maximum which the jury could reasonably find.

On further consideration and briefs and argument, the trial judge[2] entered a new remittitur reducing the amount of the judgment to $887,029. Plaintiff accepted the remittitur under protest and brought the present appeal.

We cannot on this appeal, as appellant would have us do, relitigate the question of whether there should be any remittitur at all and, upon doing so, conclude that the original jury verdict of $1,380,000 must stand. This question was settled on the prior appeal by the holding that the District Judge did not err in finding that some remittitur was required. That conclusion is the law of the case.

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1. 429 F.2d 1033 (1970).

2. Circuit Judge Ingraham, sitting by designation in his former capacity as District Judge.

The appellant did not lose his right to the present appeal by accepting the remittitur. *U. S. v. 1160.96 Acres of Land,* 432 F.2d 910 (5th Cir. 1970); *Minerals & Chemicals Phillip Corp. v. Milwhite,* 414 F.2d 428 (5th Cir. 1969); *Steinberg v. Indemnity Ins. Co.,* 364 F.2d 266 (5th Cir. 1966).

Applying the maximum recovery rule in a personal injury case in which there are pain, suffering and disfigurement — all present to a massive degree in this instance — is a Solomonic task. The record does not support any inference that the court reached into the air for a figure or proceeded by hunch or intuition. Rather it shows that he considered one by one the several elements of damages and with respect to each element made a finding of the amount which, under the evidence in the case, was the maximum that the jury reasonably could find to be compensatory for appellant's loss. The total of these was $887,029.

For each element of damages, we have considered the judge's finding, and the evidence in the case, and the appellant's earnest and detailed analysis of why that particular finding should be rejected. We conclude that in one relatively minor respect the amount of the remittitur was excessive. The judge found on remand, as he had in setting the amount of the original remittitur, that appellant lost wages of $46,213 between the time of injury and the time of trial, a period of three years and eleven months, calculated at the rate of earnings of $11,800 for the year of injury. There was testimony that at the time of trial the earnings of other employees in appellant's job assignment had increased to $13,000 per year,[3] and the judge actually used that figure in calcu-

3. Appellant errs in his contention that the evidence supports a figure of $14,000 instead.

lating loss of earnings from time of trial for life expectancy. We think appellant is correct that the jury could reasonably have found that in the three years and eleven months between injury and trial appellant would have received the increase that others received.[4] Appellant suggests the approach of apportioning the total increase among the intervening years, which seems to us reasonable. The increase of $1200 prorated at $300 increase for each twelve months produces this result:

Earnings 1st twelve mos.	$12,100
Earnings 2nd twelve mos.	12,400
Earnings 3rd twelve mos.	12,700
Earnings 11/12 of $13,000 for 4th twelve mos.	11,750
	$48,950

Thus the remittitur was excessive by $2,737 ($48,950 less $46,213), and the judgment is to be increased by that amount.

In all other respects we cannot say as to any one element of damages, or as to the total, that the judge abused his discretion in his application of the standard mandated by this court.[5]

The judgment is modified so as to increase the amount to $889,766, and as modified is AFFIRMED.

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4. The court affirmatively stated that it excluded these increases from its calculation.

5. The judge calculated that the maximum amount which the jury reasonably could have found for future dental surgery was $1900 per year. While we disagree with his method of calculating, we conclude that the figure of $1900 was, nevertheless, the correct figure.

APPENDIX E

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2027

RICHARD WILLIAM GORSALITZ,
Plaintiff-Appellant,

versus

OLIIN MATHIESON CHEMICAL CORPORATION,
Defendant-Appellee,

ELECTRIC MUTUAL LIABILITY INSURANCE COMPANY
Intervenor.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 4, 1972, 5 Cir., 1972, ____F.2d____).

(March 13, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX F

(MEDICAL COSTS)

	Amt. paid	Date of Payment	Approx. mos. to date verdict from payment or last payment date	Interest
Dr. Hardy, Ex.#91	$ 3,045.00	10-24-66	24 mos.	$385.40
"	3,600.00	5-27-65	40 mos.	710.00
"	3,900.00	12-16-65	35 mos.	682.50
"	1,500.00	8-30-67	14 mos.	105.00
"	1,350.00	5-31-68	4 mos.	27.00
	($13,395.00)			
Anesthesiology, Ex.#91	530.00	5-12-65		
	40.00	7-22-65)		
	300.00	7-13-65)	$1,130.00 for	
	85.00	7-20-65)	36 mos.	
	115.00	7-20-65)	(from 7-10-65)	
	60.00	7-14-65)		
	(1,130.00)			192.10
Dr. Maldonado, Ex.#99	1,000.00	4- 9-68	6 mos.	30.00
Dr. R. O. Emmett, Ex.#87	175.00	3-24-65)		
Dr.J.Greenwood,Ex.#94-97	650.00	7-20-65)		
Dr. J. Howell, Ex.#93	700.00	7-20-65)		
St. Patrick's Hosp., Ex.#92	112.50	12- 3-65)		
Baylor Med. Lab. ,Ex.#86	3.00	10- 4-65)	$2,043.50 for	
Dr. Spira, Ex.#96 ..	100.00	10- 4-65)	33 mos.	
Christy's Optical, Ex.#95	53.00	9- 3-65)	(from 1-1-66)	
Dr. Boniuk, Ex.#98	25.00	4-29-65)		337.07
Dr. H. Harris, Ex.#100	75.00	4-15-66)		
Lake Charles Anest.	150.00	1- 1-65)		
Nurses, Ex.#60(4)	9,440.00	8- 1-65	38 mos.	1,793.60
Total	$27,008.50		Interest	$4,262.67

APPENDIX G

(METHODIST HOSPITAL)

Exhibit No.	Dates of Hospitalization	Number of Days	Amount	Paid	Computed from Later Date No. Mos. Int.	Interest
71	11-10-66 to 1-26-65	78	8,358.55	3-24-65)	10,109.19	
72	1-27-65 to 3-1-65	32	1,750.64	3-24-65)	for 42 mos.	2,123.06
74	3-1-65 to 5-1-65	30	1,357.68	7-14-65)		
75	3-1-65 to 3-31-65	31	1,753.86	7-14-65)	4,720.37	
73	5-1-65 to 6-1-65	30	1,608.83	7-14-65)	for 39 mos.	1,062.07
76	6-1-65 to 7-1-65	30	1,746.76	8-10-65)		
77	7-1-65 to 7-28-65	27	1,525.24	10-4-65)	4,417.10	
78	8-20-65 to 9-19-65	30	1,145.10	10-21-65)	for 36 mos.	795.07
79	10-26-65 to 11-16-65	21	532.60	1-19-66)	1,129.69	
79	12-12-65 to 12-30-65	19	597.09	1-19-66)	for 33 mos.	186.40
81	2-8-66 to 2-16-66	8	245.45	9-19-66)		
80	2-27-66 to 3-3-66	4	150.90	4-15-66)		
81	3-13-66 to 4-4-66	22	653.78	10-13-66)		
81	5-1-66 to 5-31-66	30	800.81	9-19-66)	2,861.19	
81	6-29-66 to 7-10-66	11	335.30	9-19-66)	for 25 mos.	357.64
81	8-7-66 to 8-17-66	10	306.45	9-19-66)		
65	9-5-66 to 9-17-66	12	368.50	10-31-66)		
66	11-2-66 to 11-15-66	13	493.78	1-24-67)	1,227.88	
67	12-1-66 to 12-19-66	18	734.10	2-6-67)	for 20 mos.	128.95
69	1-25-67 to 2-8-67	14	639.37	7-17-67)		
68	3-26-67 to 4-8-67	13	564.15	7-17-67)	1,561.57	
70-A	5-23-67 to 5-31-67	8	358.05	7-17-67)	for 15 mos.	117.11
70-B	8-27-67 to 9-8-67	12	459.70	10-6-67)	715.40	
61	11-28-67 to 12-3-68	5	256.70	1-18-68)	for 21 mos.	76.11
63	12-14-67 to 2-19-68	67	2,583.23	7-5-68)	2,974.58	
62	5-13-67 to 5-23-67	10	391.35	7-3-68)	for 3 mos.	44.62
64	6-27-68 to 7-6-68	9	360.70	9-24-68)	899.00	
64	8-18-68 to 8-30-68	12	539.30	9-24-68)	for ½ mo.	2.25
84	12-12-65) Correction		67.80	12-12-65)	115.80	
83	12-12-66) Bills		48.00	12-12-66)	for 23 mos.	6.74
			$30,733.77		Interest:	$4,900.02

Total Interest necessary under Appendices F and G to bring to "present value at trial": **$9,162.69**

APPENDIX H

COMPUTATIONS OF MEDICAL FUTURE UNDER "MAXIMUM RECOVERY" RULE:

Dr. Hardy

(1)	Minimum 33 facial procedures	$36,150
(2)	Probable complications in the 33 procedures "double or more"	36,150
(3)	33 procedures "the more"	10,000
(4)	Osteomyelitis, long range infections, fractures, brain damage, eye loss — additional problems (double previous estimate of $73,300)	146,600

Dr. Maldonado

(5)	Surgical: $500 four times year (2,000 × 40 years)	80,000
(6)	Hospitalization: $200 × 4 times year × 40 years	32,000
(7)	Anesthetic: $100 year × 40 years	4,000
(8)	Oral appliances, $800 year × 50 years	32,000
		396,900
(9)	Inflationary factor for rising medical costs in future, 50% of total:	193,450
	TOTAL:	$590,350

These calculations are within the "realm of the wide discretion" of a jury"s evaluation of plaintiff's future medical needs. In fact, it may well be inadequate if costs continue to spiral. As Dr. Maldonado says, "The sky may be the limit".

APPENDIX I

PETITIONER'S COMPUTATIONS RATIONALIZING BOTH THE VERDICT AND THE COURT'S FINDINGS

		*
(1) PAST LOSS OF WAGES	$ 46,213.00	34.8 Yearly Earning By "Average Increase" of $300 a Year"
Allowance of "Average Annual Increase" by Fifth Circuit	2,737.00	
Allowance of Minimum Interest on Past Wage Loss	4,800.00	
(2) PAST MEDICAL EXPENSES	56,000.00	
Allowance of Interest on Past Losses to Bring to Present Value (Appx. F & G)	9,162.69	
(3) FUTURE MEDICAL EXPENSES	138,420.00	
Allowance 50% for the "SKY IS THE LIMIT", a minimum amount	69,210.00	
(4) FUTURE LOSS OF EARNING CAPACITY, BY COURT (13,000 × 34.8 Years)	452,400.00	
Allowance as PER Fifth Circuit Mandate, but Applied to Future Wages, $13,000 for 1st Year Increases to $22,900 in 35th Year Totals $627,700. Additional allowance by "average annual increase of $300 a year" ($627,700 less $452,400):	175,300	
* See Computation of Each Year for 34.8 Years		
(5) PAIN AND SUFFERING, PAST AND FUTURE, AS ALLOWED BY COURT	400,000.00	
Allowance for Jury's Difference in Opinion	25,757.31	
	$1,380,000.00	$627,700.00 T

13,000.00
13,300.00
13,600.00
13,900.00
14,200.00
14,500.00
14,800.00
15,100.00
15,400.00
15,700.00
16,000.00
16,300.00
16,600.00
16,900.00
17,200.00
17,500.00
17,800.00
18,100.00
18,400.00
18,700.00
19,000.00
19,300.00
19,600.00
19,900.00
20,200.00
20,500.00
20,800.00
21,100.00
21,400.00
21,700.00
22,000.00
22,300.00
22,600.00
22,900.00
17,400.00

APPENDIX J

1963—*Ergas v. Barricini Stores, Inc.*, Superior Court, New York, ____NYS 2d ____, Nassau County, Number B9433

Injury: 13 year old boy suffered quadriplegic injuries when struck by falling sign from defendant store owner's roof.

Award: $1,100,000. Trier: Jury

Source: 6 NACCA 219, October 1963.

1964—*Berner v. British Commonwealth Pacific Airlines, Ltd.*, 230 F. Supp. 240 (S.D. April 1964)

Injury: Death of 31 year old pianist with extraordinary skills, bright future.

Award: $920,000. Trier: Jury.

Source: 230 F. Supp. 240.

1964—*Miller v. Chatham Board of Education*, New Jersey Supreme Court.

Injury: 17 year old high school boy suffered quadriplegic injuries in gym accident.

Award: $1,200,000. Trier: Jury.

Source: 7 NACCA, page 219, August 1964; ATLA 62 (1968); New York Times, 3 July 1964.

1965—*Trese Hollerich v. Boeing Co. and Northwest Airlines, Inc.*, Circuit Court of Cook County, Illinois, Number 63 C 20360

Injury: Death from airplane crash, 42 year old road builder.

Award: $2,000,000. Trier: Judge

Source: New York Times, 11 April 1965.

1965—*Kirkeby v. American Airlines, Inc.*, ____NYS 2d ____, Supreme Court

Injury: 60 year old financial wizard and millionaire perished in airline crash in Jamaica Bay, Queens.

Award: $1,200,000. Trier: Not known.

Source: 31 ATL Law Journal 584; 8 ATL Newsletter 236, September 1965.

1967—*Cohen v. Gulf Oil Corp.*, Common Pleas Court Number 6, Philadelphia, Pennsylvania, Number 928

Injury: Successful 43 year old trial lawyer suffered quadriplegic injuries from rear end auto accident.

Award: $1,100,000. Trier: Not known.

Source: ATLA, September 1969, page 376-377; ATLA Vol. 10, page 187, June 1967; New York Law Journal, 26 May 1967.

1967—*Crewse v. St. Jude Hospital*, Orange County Superior Court, Number 145,073

Injury: 45 year old service station attendant suffered brain damage, inability to speak and mental retardation—medical malpractice.

Award: $1,400,000. Trier: Jury.

Source: Court records.

1968—*Lucas v. Lovelace Clinic*, New Mexico District Court for Bernalillo County

Injury: 3 year old boy suffered severe radiation burns with the likelihood the burns will eventually cause cancer.

Award: $1,250,000. Trier: Jury.

Source: ATLA Newsletter, page 194, June 1968.

1968—*Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, U. S. District Court of Houston

Injury: Electrical burns and shock to 40 year old electrician.

Award: $1,380,000. Trier: Jury.

Source: 429 F.2d 1033.

1969—*Talcott v. Hall*, 224 So.2d 420 (Florida Appeal) certiorari denied

Injury: 35 year old housewife suffered castastrophic brain damage and quadriplegic injuries caused by malpractice of hospital and doctors.

Award: $1,500,000. Trier: Jury.

Source: 224 So.2d 420.

1969—*Brinegar v. San Ore Construction Company, et al*, 302 F. Supp. 630, Eastern District of Arkansas

Injury: 23 year old oiler and deckhand suffered quadriplegic injuries when boat capsized at a lock.

Award: $1,000,000. Trier: Jury.

Source: 302 F. Supp. 630.

1969—*Jack Adams v. Louisville and Nashville R.R.*, ____ F. Supp. ____, Alabama

Injury: 7 week old baby suffered permanent brain damage. The child will never walk or talk, struck by a passenger train.

Award: $1,000,000. Trier: Jury.

Source: ATLA, February 1969, page 11; Kansas City Times, 15 December 1969.

1969—*Linder v. ABC Block Company of Reno, Nevada,* Reno, Nevada, Circuit Court Number 245,573

Injury: Death.

Award: $1,482,500. Trier: Jury.

Source: Letter from Judge.

1970—*Matthew Edmund Stahl v. Coca Cola Company of Georgia, Morse Auto Rentals, Inc. of Miami and Robert Leslie Jacobs,* Circuit Court, Dade County, Florida, Number 686,142.

Injury: Permanent brain damage to 21 year old junior college student. He has been unable to communicate and will never walk again and must have constant attention.

Award: $2,250,000. Trier: Jury.

Source: ATLA Vol. 13, Number 3, April 1970, at page 132; New York Times, 22 March 1970, page 20, column 3.

1970—*Elefther v. Beech Aircraft Corporation,* Superior Court of California, Santa Ana Division

Injury: Death of 51 year old husband-father earning $30,000.

Award: $1,000,000. Trier: Jury.

Source: May Newsletter of ATLA 1970, page 165.

1970—*Thomas Dyrnes v. Consolidated Edison Corporation, et al,* ____NYS 2d____ Sup. Court

Injury: 24 year old paint sprayer who suffered quadriplegic injuries and brain stem injuries.

Award: $1,250,000. Trier: Jury.

Source: ATLA June 1970, page 224; Personal Injury Newsletter, 8 June 1970, Vol. 13, Number 24, page 28; Daily News of Brooklyn, 15 May 1970; New York Times, 17 May 1970.

1970—*Bleck v. City of Beverly Hills,* ____ Cal. Reporter ____, Cal. 2nd Appeal District, Division 5, Civil Action Number 32585

Injury: Quadriplegic injuries when tree fell on plaintiff's car.

Award: $1,500,000. Trier: Jury.

Source: ATLA September 1969, Vol. 13; ATLA October 1970, pages 362, 363, Vol. 8.

1970—*Rebecca Beasley v. North Central Airlines,* Cook County Circuit Court, Illinois

Injury: Paraplegic injuries suffered by a 27 year old social worker in an airplane crash.

Award: $1,000,000. Trier: Not known.

Source: ATLA Vol. 13, page 289, August 1970; Personal Injury Newsletter, 1970.

1970—*Moore v. Jewel Tea Company and Drano,* ____ N.E.2d____, Numbers 42802 and 42803, Illinois Supreme Court affirmed the decision

Injury: Severe injuries suffered by housewife when drano can exploded; 48 years old and has total blindness in both eyes.

Award: $980,000. Trier: Not known.

Source: ATLA November 1970, pages 415 and 416.

1970—*Keith Bush v. General Electric Company,* 2d Judicial District Court for Washoe County, Nevada

Injury: 31 year old mechanic suffered quadriplegic injuries.

Award: $3,650,000. Trier: Jury.

Source: ATLA December 1970, Vol. 13, Number 10, pages 447 and 448; ATLA November 1970, Vol. 13 pages 394 and 395; ATLA December 1970, Vol. 13, Number 10, pages 474 and 475.

1970—*Ranells v. City of Cleveland,* Court of Common Pleas, Ohio, Number 974,668

Injury: Death from chlorine gas poisoning.

Award: $1,359,032. Trier: Jury.

Source: ATLA December 1970 pages 447 and 477.

1970—*Frankel v. United States,* ____F. Supp.____, Eastern District of Pennsylvania, Number 40367

Injury: Brain damage, lost leg, emotional distress, etc. to 24 year old woman student.

Award: $1,186,998. Trier: Judge.

Source: ATLA April 1967, Vol. 14, Number 3; ATLA April 1971; ATLA October 1971.

1971—*Heym v. United States,* U. S. District Court in Philadelphia, Pennsylvania

Injury: 24 year old girl severely injured in car wreck.

Award: $1,200,000. Trier: Judge.

Source: San Francisco Examiner, 5 January 1971.

1971—*Charles Samuel Moyer v. North American Rockwell Corporation, et al,* Circuit Court, Orange County, Florida, Number 68-3900

Injury: 37 year old vacuum cleaner salesman suffered irreversible brain damage with permanent and total disability.

Award: $1,950,000. Trier: Jury.

Source: ATLA March 1971, Vol. 14, Number 2, page 51; Orlando Sentinel, 7 January 1971; The Miami Herald, 8 January 1971.

1971—*Luttig v. Mine Safety Appliances Company and Capitol Fire Equipment Company,* Sacramento Superior Court, Action Number 184406

Injury: 34 year old fireman suffered irreversible brain damage leaving him in a comavigil state requiring institutionalization for life.

Award: $1,000,000. Trier: None, settlement.

Source: ATLA March 1971, Vol. ____, Number ____, page 522; The Sacramento Union, 17 January 1971.

1971—*Grame Murdock v. City of Philadelphia,* ___F. Supp.____, Eastern District of Pennsylvania, Civil Action Number 42647

Injury: Partial paralysis and brain damage to 41 year old lawyer.

Award: $3,009,406. Trier: Jury.

Source: ATLA June 1971; Philadelphi. Evening Bulletin, 21 June 1971; Courier Post, Camden, New Jersey, 21 January 1971; ATLA Vol. 14, Number 2, page 95.

1971—*Lemaster v. C.R.I. and R.R.R.,* Circuit Court of Cook County, Illinois, Number 69L 11889

Injury: Amputation of left leg, amputation of left arm, complete loss of right big toe, one half of his 2nd toe lost, and one half of tip of small toe.

Award: $1,000,000. Trier: Not known.

Source: ATLA August 1971; Chicago Tribune, 27 January 1971.

1971—*Sobon, et al v. Wisconsin Natural Gas Company, et al,* Wisconsin Circuit Court

Injury: 14 year old grade school student suffered paraplegic injuries.

Award: $994,588. Trier: Jury.

Source: Jury Verdict Research, Vol. 8, Issue 31, 27 April 1971; ATLA May 1971, page 177.

1971—*Falconer v. Long Island Lighting Company,* ____ NYS 2d____, Sup. Ct., 5 February 1971

Injury: 3 year old girl lost both arms when she touched an electrical transformer.

Award: $1,350,000. Trier: None, settlement.

Source: ATLA June 1971; New York Daily News, 24 February 1971; New York Times, 24 February 1971, page 22, column 4.

1971—*Juliana R. Mason v. Waco Scaffold and Shoring Company, Inc.*, Circuit Court, 18th Judicial District Court, Brevard County, Florida, Number 47866, 10 February 1971

Injury: 31 year old unmarried male suffered paralyzing injuries with compression of spinal cord at thoracic-12 with resulting paraplegic in both legs.

Award: $1,000,000. Trier: Jury.

Source: ATLA June 1971, page 218, ATLA Vol. 14, Number 3.

1971—*Cursz v. Lalko,* Superior Court, Newark, New Jersey, 19 February 1971

Injury: Quadriplegic injuries suffered by 23 year old married man.

Award: $1,500,000. Trier: Jury.

Source: ATLA June 1971, page 230, 231; The Evening News, Newark, New Jersey, February 1971.

1971—*Paul Priolo, et al v. American Hospital Supply Corporation and Don Baxter,* Sacramento County Court, California, February 1971

Injury: Death of 22 year old wife-mother.

Award: $1,900,000. Trier: Not known.

Source: ATLA June 1971; The Sacramento Bee, 26 February 1971.

1971—*Schnebly, et al v. Baker, et al,* District Court, Cerro Gordo County, Iowa, Number 39962, 18 March 1971

Injury: Quadriplegic injuries to infant due to incompatible RH factor; failure to promptly make blood transfusion.

Award: $1,055,798. Trier: Judge.

Source: ATLA June 1971, page 223.

1971—*Forest Beachboard v. Southern Railway Company,* Buncombe County, North Carolina, Superior Court, 26 March 1971

Injury: Double leg amputation to railroad employee.

Award: $1,000,000. Trier: Jury.

Source: ATLA September 1971; Durham Morning Herald, North Carolina, 28 March 1971.

1971—*Malcolm W. Robertson v. Joseph N. Muheim, et al,* Tucson Sup. Court, Arizona, 9 April 1971

Injury: 18 year old wife suffered permanent injuries.

Award: $1,150,000. Trier: Jury.

Source: ATLA August 1971; The Arizona Daily Star, 10 April 1971.

1971—*Ellinger v. Cunhane,* Alameda County Superior Court, Cal., May 1971

Injury: Brain damage to 24 year old mother of 3 children.

Award: $1,200,000. Trier: None, settlement.

Source: Court records.

1971—*Darryl Davis v. William Lee Stanford, Certified Life Insurance Company,* Sup. Court, San Mateo County, California, Number 148,431, 13 May 1971

Injury: Paraplegic 29 year old bachelor.

Award: $1,505,000. Trier: Jury.

1971—*McCarrick v. Richardson-Merrill, et al,* Central District Superior Court, Los Angeles, California, Number 882-426, 18 June 1971

Injury: Thalidomide baby; 9 years old at time of trial.

Award: $1,500,000. Trier: Jury.

Source: ATLA November 1971, page 410.

1971—*Evelhock v. Beech Aircraft Corporation,* Orange County, California, June 1971

Injury: Death of passenger.

Award: $2,000,000. Trier: Jury.

Source: ATLA August 1971, page 285.

1971—*Pease v. Beech Aircraft Corporation,* Orange County, California, June 1971

Injury: Death of 21 year old radio apprentice operator.

Award: $1,000,000. Trier: Jury.

Source: ATLA August 1971.

1971—*Warnick v. Beech Aircraft Corporation,* Orange County, California, June 1971

Injury: Death of 35 year old business executive.

Award: $3,615,000. Trier: Jury.

Source: ATLA August 1971.

1971—*Gregory v. Beech Aircraft Corporation,* Orange County, California, June 1971

Injury: Death.

Award: $2,000,000. Trier: Jury.

Source: ATLA August 1971.

1971—*Knapp v. Companie Dominicana de Aviacion,* 251 So.2d 18, Florida Appeal 1971; affirmed; rehearing denied 20 August 1971

Injury: Death of 15 year old boy when plane crashed into building.

Award: $1,800,000. Trier: Jury.

Source: 251 So.2d 18.

1971—*James C. Parrish, Jr. v. Vasco A. Arosemena, et al,* Dade County Circuit Court, Florida, 24 August 1971

Injury: 18 year old boy suffered quadriplegic injuries in automobile accident.

Award: $1,695,000 settlement. Trier: Judge.

Source: ATLA December 1971, page 468; The Miami Herald, 25 August 1971.

1971—*Brittain v. Garrett-Airesearch Inc. of Phoenix,* San Diego County Superior Court, 17 September 1971

Injury: Death by air crash.

Award: $1,350,000. Trier: Jury.

Source: ATLA February 1972.

1971—*Feldman v. Clem Guider Lincoln Mercury of West Palm Beach,* Dade County Circuit Court, Florida, 16 September 1971

Injury: Wife suffered paraplegic injuries in automobile accident.

Award: $1,100,000. Trier: None, settlement.

Source: ATLA February 1972, page 20; The Miami Herald, 18 September 1971; Miami Beach Sun, 18 September 1971; The Miami News, 17 September 1971.

1971—*Elizabeth M. Cyester v. Storme Gregoris,* Superior Court of California, County of San Bernardino, Number 151,036

Injury: Quadriplegic injuries.

Award: $1,000,000. Trier: None, case settled.

Source: Letter from Clerk of Court and verification letter from plaintiff's attorney.

1971—*Earl Lassiter v. Operating Engineers Local 675 and International Union of Operating Engineers,* Circuit Court, Fort Lauderdale, Florida, December 1971

Injury: Plaintiff was beat up by union members and still suffers a partial hearing loss.

Award: $1,250,000. Trier: Jury.

Source: ATLA February 1972, page 3.

1972—*James Bailey v. General Electric Company*, Alameda County Superior Court, 10 January 1972

Injury: 45 year old man suffered permanent brain injuries and he requires constant care and hospitalization.

Award: Settlement for $1,600,000, approved by Court.

Source: Court records.

1972—*Wilheem Konieczy, Ind., etc. v. Manpower of Lake Charles, Inc.*, 14th Judicial District Court of Lake Charles, Louisiana, Number 91,549

Injury: 19 year old boy suffered loss of right leg, pelvic area, and part of his right arm.

Award: Settlement for $800,000.

Source: Morning Advocate, 19 February 1972.

1972—*Joe H. Dial v. Orlin V. Wry, Jr.*, Superior Court, Tucson, Arizona, 11 March 1972

Injury: Husband and wife suffered grotesque and deforming permanent injuries with brain damage.

Award: $3,400,000. Trier: Jury.

Source: The Arizona Daily Star, Tucson, Arizona, Saturday, 11 March 1972.

1972—*Harrison J. Cheramie, Jr. v. State of Louisiana*, 19th District Court, East Baton Rouge Parish, Louisiana—1972, Appeal No. 8884, Court of Appeals, 1st Circuit

Injury: 32-year old quadriplegic.

Award: $1,211,453.88. ($850,000.00 for pain and suffering). Trier: Judge.

Source: Court records.

1972—*Ray Rosendin v. Avco-Lycoming Corp.*, Santa Clara County, California, 9 March 1972

Injury: 43-year old businessman lost both legs in plane crash; lost wife.

Awards: $ 1,000,000 for injuries;
$ 1,200,000 for death of wife;
$10,500,000 punitive damages.

$12,700,000

Trier: Jury.

Source: Houston Chronicle, March 10, 1972, Sec. 2, p. 5.

APPENDIX K

FILED
APR 29 1972

IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1466

RICHARD WILLIAM GORSALITZ, *Petitioner*

v.

OLIN MATHIESON CHEMICAL CORPORATION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are as presented in the Petition. The second opinion of the United States Court of Appeals for the Fifth Circuit and its Order overruling Motion for Rehearing and for Rehearing En Banc is now reported at 456 F.2d 180.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The questions which Petitioner would have this Court review apparently can be reduced to the following:

A. Is the remittitur practice in federal courts a violation of the Fifth and Seventh Amendments of the Constitution of the United States?

B. Was the particular remittitur ordered in this case justified?

We confess that we do not completely understand the multitude of convoluted variations of these questions as presented by Petitioner, but these two questions are at the foundation of them all.

STATEMENT OF THE CASE

This is a negligence suit for damages for personal injuries sustained by the Plaintiff-Petitioner Gorsalitz while he was engaged in the repair of electrical equipment at Defendant-Respondent Olin Mathieson Chemical Corporation's (Olin) plant in Lake Charles, Louisiana. Suit was brought against Olin in the United Statss District Court. Subsequently, Plaintiff's employer, the General Electric Company, was joined as a third party Defendant in an action for indemnity. There was also an intervention on behalf of Electric Mutual Liability Insurance Company seeking recovery of amounts paid under the Texas Workmen's Compensation Act.

The case was tried before a jury commencing on September 30, 1968. On October 10, 1968, the jury returned a verdict finding negligence on the part of Olin and awarding damages in the sum of $1,380,000.

Plaintiff then moved for a judgment on the verdict; Defendant Olin moved for judgment notwithstanding the verdict and in the alternative for a new trial based on excessiveness of the verdict; and third party Defendant General Electric moved to dismiss the third party complaint, or in the alternative, for a directed verdict on the third party complaint in its favor.

In an opinion rendered on March 20, 1969, the United States District Court, Judge Joe Ingraham presiding, ruled in favor of third party Defendant General Electric, denied Olin's Motion for Judgment Notwithstanding the Verdict, found the jury verdict excessive, granted Olin's Motion for New Trial unless the Plaintiff remit a sufficient amount to reduce the award to $690,633.

Petitioner Gorsalitz voluntarily accepted the remittitur "under protest" and both parties appealed from the final judgment. The United States Court of Appeals for the Fifth Circuit, in its June 17, 1970 opinion, 429 F.2d 1033, affirmed the trial court's judgment insofar as Olin's appeals against both Gorsalitz and General Electric were concerned. It further found that the granting of a remittitur did not violate the Seventh Amendment, and it found that *in this case* there was a sufficient factual and legal basis to justify a remittitur.

The Fifth Circuit did find, however, that the trial court had used the wrong standard in determining the amount of remittitur, and remanded the case for a recomputation

of the remittitur based upon "the highest amount which the jury could properly have awarded." 429 F.2d at 1046.

On March 27, 1971, Judge Ingraham, sitting by designation, proceeded to determine "the maximum amount, upon the evidence presented, which the jury could reasonably find to be compensatory of the Plaintiff's loss."[1] Applying that Fifth Circuit standard, he found again that the verdict was excessive in view of the evidence, and he found that the maximum damages which could be justified by the evidence was $887,029.

Again Gorsalitz voluntarily accepted the remittitur "under protest" and appealed once more. By this time the Intervenor, Electric Mutual Liability Insurance Company, had accepted out of the proceeds of this judgment that had been tendered into the Registry of the Court on behalf of Olin the amount awarded to it by the trial court's second judgment, and for that reason it is no longer a party to this action. The new panel of the Fifth Circuit affirmed, holding that they could not "say as to any one element of damages, or as to the total, that the judge abused his discretion in his application of the standard mandated . . . ." 456 F.2d at 181. The Court modified the judgment in only one minor respect. Obviously examing the evidence in great detail,[2] the Fifth Circuit increased the judgment by $2,737, finding that the trial court in determining

---

1. Petition, Appendix B, at 45.

2. The Court of Appeals in this review went at rather extraordinary lengths to examine the evidence upon which the damages were computed. For example, the Court of Appeals determined the trial court had arrived at the correct amount of future dental expenses ($1,900) even though "we disagree with his method of calculating." 456 F.2d at 181, fn. 5.

lost wages from injury to the date of trial, had failed to consider increases in earnings of other employees in Gorsalitz' job assignment.

Gorsalitz has now filed his Petition for Writ of Certiorari, raising again the same time-worn complaints that have been considered by the Court of Appeals and the District Court so many times in this case alone.

ARGUMENT

I. The law is well established that the federal remittitur practice is a sound judicial procedure and is constitutional.

Petitioner has been unable to cite any authority which casts any doubt upon the constitutionality of the procedure utilized in this case. He vaguely makes reference to the Seventh Amendment to the United States Constitution, and would have this Court somehow reach the conclusion that when a trial court reduces damages to the maximum amount a jury could, in accordance with the evidence, assess, the function of a jury is usurped.

This attack has often been attempted in the years since Justice Story handed down his landmark decision in *Blunt v. Little* (CCD Mass. 1822) 3 Fed. CAS 760, No. 1578, 3 Mason 102. There, the jury returned a verdict for $2,000 damages for injuries suffered as a result of a malicious arrest. Upon defendant's motion for new trial, Justice Story directed that the cause be submitted to another jury unless Plaintiff were willing to remit $500 of the damages. The Plaintiff remitted that amount. and the motion was denied.

This Court first approved that practice in *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642 (1886), stating:

> The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. 116 U.S. at 646-47.

The first head-on constitutional attack on remittitur was in *Arkansas Valley Land and Cattle Company v. Mann*, 130 U.S. 69 (1889). There, this Court considered the same arguments made here and concluded:

> The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. *Ducker v. Wood*, 1 T.R. 277; *Hewlett v. Crutchley*, 5 Taunt. 277, 281; authorities cited in Sedgwick on Damages, 6th ed. 762, note 2. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. *Id.* at 74.

An unbroken line of legal precedent has followed the rationale of *Arkansas Cattle Co. v. Mann, supra,* including numerous U. S. Supreme Court cases such as *Kennon v. Gilmer,* 131 U.S. 22 (1889); *Clark v. Sidway,* 142 U.S. 682 (1892); *Hansen v. Boyd,* 161 U.S. 397 (1896); *German Alliance Insurance Company v. Hale,* 219 U.S. 307 (1911) *Gila Valley, G. & N. Ry. Co. v. Hall,* 232 U.S. 94 (1914); *Union Pacific Railroad Co. v. Hadley,* 246 U.S. 330 (1918).

A recent pronouncement by this Court was in *Linn v. United Plant Guard Workers of America,* 383 U.S. 53 (1966), involving damages in a libel suit. There, this Court said:

> . . . the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. . . . If the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial. *Id.* at 65-66 (emphasis supplied).

As one commentator stated, the remittitur practice in federal courts "has become so universal in the trial and even the appellate courts and has the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by *Erie-Tompkins.*" 6A Moore, FEDERAL PRACTICE Sec. 59.05[3], at 3739-40 (2d ed. 1971). Moreover, if there were no remittitur practice, every excessive verdict would require a new trial, even when there are no other irregularities in the original trial.

Petitioner Gorsalitz' attack on the constitutionality of remittitur is thus patently without merit, and, we submit,

does not present sufficient grounds for granting a writ of certiorari.

II. The Court of Appeals for the Fifth Circuit has determined that the facts sufficiently justify this precise remittitur; there is no justification for this Court to again review those facts.

It should be noted at the outset, that only in the Fifth Circuit is there authority permitting a Plaintiff such as Petitioner here to accept a remittitur voluntarily, "under protest" or otherwise, and then obtain a review of the trial court's actions. This Court and all of those circuit courts which have passed upon the question have held that such an appellate review is not available once a remittitur is accepted. See *United States v. 1160.96 Acres of Land,* 432 F.2d 910 (5th Cir. 1970); *Minerals & Chemicals Philipp Corp. v. Milwhite Co.,* 414 F.2d 428 (5th Cir. 1969); and *Steinberg v. Indemnity Ins. Co. of North America,* 364 F.2d 266 (5th Cir. 1966). Contra, *Woolworth v. Chesbrough,* 244 U.S. 79 (1917); *Koeningsberger v. Richmond Silver Mining Co.,* 158 U.S. 41 (1895); *Lewis v. Wilson,* 151 U.S. 551 (1894); *Kennon v. Gilmer,* 131 U.S. 22 (1889); *Mattox v. News Syndicate Co.,* 176 F.2d 897 (2d Cir. 1949); *Movible Offshore Co. v. Orsly,* 346 F.2d 870 (5th Cir. 1965); *Delta Engineering Corp. v. Scott,* 322 F.2d 11 (6th Cir. 1963); *Bristol Gas & Electric Co. v. Boy,* 261 F. 297 (6th Cir. 1919); *Collum v. Butler,* 421 F.2d 1257 (7th Cir. 1970); *Rothschild v. Drake Hotel, Inc.,* 397 F.2d 73 (7th Cir. 1968); *Dorin v. Equitable Life Ass. Soc. of the United States,* 382 F.2d 73 (7th Cir. 1967); *Casko v. Elgin, Joliet and Eastern Ry. Co.,* 361 F.2d 748 (7th Cir. 1966); and *S. Birch & Sons v. Martin,* 244 F.2d 556 (9th Cir. 1957).

Petitioner, having voluntarily accepted the remittitur "under protest", has obtained such a review of the possible abuse of discretion by the trial court, unavailable in the other circuits, and he has done it, not once, but *twice*, by two different panels of judges of the Fifth Circuit. While it is not now urged by Respondent that this Court take up this conflict in law among the Circuits, the fact that such a review is unavailable elsewhere does have a bearing upon whether Petitioner's rights have been abused such that this Court should grant a writ of certiorari.

Petitioner's entire argument is premised upon three erroneous assumptions: First, that the jury verdict of $1,380,000 was fully supported by the evidence; Secondly, that no court has ever determined that the verdict was not supported by the evidence; and Thirdly, that the remittitur was required for some reason other than the failure of the evidence to support the verdict.

At no time has any court said that the evidence supported the verdict. Four times the lower courts have passed on the very question of whether the evidence in this case did support the jury verdict, and four times, they said it did not.[3]

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3. "[i]t is the Court's opinion that $889,367 allocable to pain and suffering is excessive, the result of undue sympathy on the part of the jury." Petition, Appendix A, at 39. (District Court, March 20, 1969)

. . .

"We think that the trial judge, in the exercise of his necessarily broad discretion, could properly find that *some* part of this large verdict resulted from undue sympathy on the part of the jury. We hold, therefore, that the District Court did not err in conditionally requiring *some remittitur*. . . ." 429 F.2d at 1046 (emphasis in original) (Fifth Circuit, June 7, 1970).

"The Court continues in its belief that the verdict was excessive, the result of undue sympathy on the part of the jury.

"The damages above discussed and found by the Court to be the maximum figure which a reasonable jury could award under the evi-

After all this, Petitioner now wants the United States Supreme Court to evaluate the evidence once again. It is not the function of the Supreme Court to re-examine the facts in evidence, as Petitioner would have it do, in order to determine again if the remittitur were justified.

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."
>
> *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

While there is general authority, as above, that this Court will not re-examine facts determined by two courts below, and that this Court will not ordinarily review the failure of the trial court to grant a new trial because of excessiveness or inadequacy of the verdicts below, *Fairmount Glass Co. v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), there appears to be practically no authority on the scope of review where plaintiff has accepted a remittitur and judgment has been entered thereon. This situation is clearly the result of the line of authority cited above to the effect that once a plaintiff (as here) has voluntarily accepted a remittitur, he has waived his right to have the amount of judgment examined by an appellate court.

It should also be kept in mind that if one is to examine a trial judge's denial or granting of a motion for new

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dence presented totaled $887,029." Petition, Appendix B, at 44-45. (District Court, March 26, 1971)
"In all other respects we cannot say as to any one element of damages, or as to the total, that the Judge abused his discretion in his application of the standard mandated by this Court." 456 F.2d at 181. (Fifth Circuit, February 4, 1972)

trial because of the amount of the verdict, the scope of review by appellate courts is necessarily narrow. The ruling on such a motion is within the sound discretion of the trial court, and can only be set aside when there is clear and grave abuse of discretion. *Fairmount Glass Works v. Cut Fork Coal Co.*, 287 U.S. 474 (1933).

Appellate Courts in the United States have historically given great deference to the trial judge, who has had the opportunity to observe the witnesses and consider the evidence in the context of a living trial rather than upon a cold record. See, e.g., *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969); *Delta Engineering Co. v. Scott*, 322 F.2d 11 (5th Cir. 1963), cert. denied 377 U.S. 905; 6A J. Moore, FEDERAL PRACTICE, Sec. 59.95[5] at 3756-58 (2d ed. 1971); Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1951).

In recognizing that the trial court is better equipped to rule on questions of excessive damages, appellate courts have properly limited their review of that court's actions to cases where there is a clear showing of grave abuse of discretion. For example, in *Houston Coca-Cola Bottling Co. v. Kelley*, 131 F.2d 627 (5th Cir. 1942), the Court stated:

> "The duty of granting a new trial in a jury case for, or otherwise correcting, excessiveness in fact in a verdict, is exclusively that of the trial judge, and the granting or denial of a new trial on the ground of excessive damages is a matter of discretion with the trial court, not subject to review except for grave abuse of discretion. *Id.* at 628.

The Fifth Circuit, in its second review of the trial court's action in this case, specifically found no such abuse of discretion.

The so-called "Rules for Establishing Excessiveness" set out on page 19 of the Petition, it should be pointed out, are not standards which were used by any of the courts here involved, but rather are the imaginative concoctions of Petitioner, viewing the Court's actions through his own extraordinarily distorted prism. The Honorable Judge Joe Ingraham made quite clear the standard he was using. He was determining the maximum amount of money a jury, viewing *this* evidence in *this* case, could reasonably award.[4] It is difficult to imagine that he abused his discretion in awarding Gorsalitz nearly $900,000, plus interest of 6% per annum from the date of the verdict (October 10, 1968).

Gorsalitz spends much time alleging that other courts, at other times, have awarded more damages than here. Petitioner cites private information, rumors, newspaper publications and statistics he was never able to introduce into evidence, many not having existed at the time of trial. Such material should not be considered by any Court and Respondent has no way of knowing the truth of these matters, nor what the final disposition of them was. The award here must be based on the evidence in this case, and only that is relevant.

Petitioner is basically complaining that one trial judge in one isolated case should have given him more money. Certainly no important legal issues or matters of public policy are present. A review by this Court of the amount of money awarded Gorsalitz would affect no parties other than the litigants in this lawsuit.

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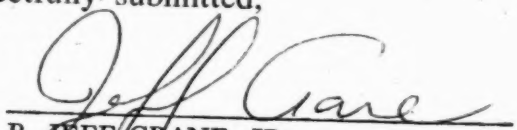
4. See p. 9 supra, fn. 3.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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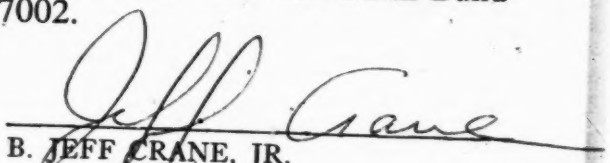

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OLIN MATHIESON CHEMICAL CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

Petitioner, Richard William Gorsalitz, presents his petition for a rehearing of this Court's order dated June 19, 1972, denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Argument on rehearing is confined solely to denial of $206,004 in damages by affirmance of the remittitur required by the trial court, petitioner hoping to more

clearly "pinpoint" the need for this Court's review of the case under established legal principles.

In taking away $206,004 in damages assessed by the jury, the trial court states:

> "As to future loss of earnings, the evidence upon trial would not support a jury finding in excess of $13,000 per annum for the remainder of plaintiff's life. Plaintiff's life expectancy was shown to be 34.8 years. Considering the plaintiff's injuries and medical prognosis, the jury could not reasonably find a life expectancy in excess of this figure. Thus, the total amount for loss of future earnings would be $452,400. However, the jury was instructed to award only such sum of money if now paid in cash as would reasonably compensate the plaintiff for his loss. Taking into consideration the decreased buying power of the dollar at present day and other intangibles that a properly functioning jury may consider in assessing an award for loss of future earnings, I find that the maximum amount the jury could reasonably determine to be compensatory of plaintiff's loss of future earnings, if now paid in cash, is $246,396."

In affirming this remittur, the Fifth Circuit clearly ignores its own settled rule of law as to future wage losses, as announced in *St. Louis Southwestern Railway Co. v. Williams,* 397 F.2d 147 (5th Cir. 1968), wherein the Court states:

> "It was open to the jury to reason that his wage rate would probably have increased and that his expectancy of earnings would have been larger."

The holding likewise conflicts with *Rosiello v. Sellman,* 354 F.2d 219 (5th Cir. 1965), and *Brinegar v. San Ore Construction Co.,* 302 F.Supp. 630, stating:

> "The jury could have found, however, that the normal increase in earning capacity . . . along with inflation, could have offset any reduction to present value."

A "classic conflict of decisions" exists because the Court has reduced a jury award of $452,400 in future wage loss to $246,396 by use of the "annuity formula", which formula the Fifth Circuit has previously and consistently held cannot be applied as to such measure of damage. Surely the Supreme Court's discretionary powers to preserve jury verdicts under the Seventh Amendment, and to maintain legal precedent and unanimity of case law, compels the Court to grant this petition.

Further, the present opinion conflicts with *United States v. 1160.96 Acres of Land,* 432 F.2d 910 (5th Cir. 1970), wherein the Fifth Circuit actually cites *Gorsalitz* for the premise that "an incorrect legal standard" cannot be the basis for a remittitur, stating:

> *"The remittitur was erroneous because it is based on an incorrect legal standard.* Whatever doubt there might have been before, this Court has now adopted the rule which limits reductions to the highest amount which the jury could have found."

In finding that the jury's award for future wage loss could have been reasonably construed to be $452,400 based on wages at time of trial, the Court was applying an "incorrect legal standard" in reducing such maximum recovery by an annuity formula.

Insistence on mathematical precision would be illusory and the jury must be allowed a fair latitude to make reasonable approximations as to future losses guided by judgment and practical experience.

In the landmark case of *Barry v. Edmunds*, 116 U.S. 550, 6 S.Ct. 501, 29 L.Ed. 729 (1886), this Court recognized this premise, stating:

> " . . . in actions for torts where no precise rule of law fixes the recoverable damages, it is a peculiar function of the jury to determine the amount of their verdict."

The present decision "usurps" this jury function and substitutes the trial court's determination of damages for future lost wages at "the minimum recovery", rather than maximum recovery, by denying over $200,000 in damages assessed by the jury.

The orderly administration of justice, and the "due process of law" provision of the Constitution of the United States, dictates this Court grant this petition because of application of the "incorrect legal standard" under the remittitur practice.

If in fact the jury's evaluation of future wage loss was $452,400, as determined by the Court, then under both the *Grunenthal* and *St. Louis S. W. Railway Co.* decisions the jury could refuse to discount this amount, based upon "current wages of $13,000 as of time of trial", because the jury could have legally and factually reasoned that the future annual wage would have been greater than $13,000 due to either normal wage increases or future inflations in salary.

Since the "maximum recovery" rule is to be applied, its application necessarily required the Court to allow the full $452,400 allegedly assessed by the jury for loss of future wages. Otherwise, the risk of obtaining "fair compensation" is cast upon the injured, rather than the

wrongdoer; and, the benefits of a jury verdict as guaranteed by the Seventh Amendment are destroyed by judicial review of "second guessing".

In refusing certiorari in this case, the Supreme Court ignores the very basis for its review of a remittitur as expressed in *Grunenthal v. Long Island R. Co.*, 89 S.Ct. 331, 393 U.S. 156, 21 L.Ed.2d 309 (1968), and the very type of "judicial interference" with damage findings condemned by this Court in that opinion, which interference is said to require the Court of Appeals to make a "detailed appraisal of the evidence bearing on damages":

> *"We read Dagnello, however, as requiring the Court of Appeals in applying this standard (abuse of discretion) to make a detailed appraisal of the evidence bearing on damages.* Indeed this re-examination led to the conclusion in Dagnello that it was not a denial of justice to permit the jury's award to stand. *If the Court of Appeals made a similar appraisal of the evidence in this case, the details are not disclosed in the majority opinion.* Beyond attaching unexplained significance to petitioner's failure in his complaint 'to ask for damages in such a large sum as $305,000,' the relevant discussion is limited to the bald statement that "giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in Dagnello . . . we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.' 388 F.2d, at 484. *We have therefore made our own independent appraisal of the evidence.*". (italics added)

The Supreme Court has not made an "independent appraisal of the evidence" in this case because current practices of the Court do not permit filing of the record *unless*

certiorari is granted. However, the same argument made in *Grunenthal* is applicable to the opinion of the Fifth Circuit in the present case. . . If the appellate court appraised the evidence, the details are not disclosed in its opinion.

CONCLUSION AND CERTIFICATE

Petitioner respectfully urges this petition for rehearing be granted, and that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Counsel for petitioner further certifies that this petition for rehearing is presented in good faith and not for delay, and in accordance with Rule 58, subdivision 2, of the Rules of this Court, by his signature below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true copy of this petition for rehearing was served by United States Mail, postage prepaid, on counsel for respondent, Vinson, Elkins, Searls & Smith, First City National Bank Building, Houston, Texas, 77002, on this the 11th day of July, 1972.